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# **Automated Vehicles: Background Papers to the Preliminary Consultation Paper**

# Contents

These are the background papers to the full consultation paper, available on our websites at <https://www.lawcom.gov.uk/project/automated-vehicles/> and <https://www.scotlawcom.gov.uk/publications>.

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# Background paper 1: Who is liable for road traffic offences?

1.1 The process of driving and using a motor vehicle is the subject of a wide variety of criminal offences. We have identified 71 road traffic offences which we consider under seven headings, depending on whether the offence relates to:

- (1) the condition of the driver;
- (2) the condition of a vehicle;
- (3) the way the vehicle is driven;
- (4) where a vehicle is driven;
- (5) where a vehicle is left;
- (6) conduct following an accident; or
- (7) safety, (including responsibility for the safety of children).

1.2 The most serious offences are those where the driver causes death or serious injury. These aggravated offences raise particularly difficult issues, and are discussed separately in Background Paper 2.

1.3 The offences are listed in the accompanying table. This table does not contain every offence. As this project is focused on passenger vehicles, we have not included offences which apply only to agricultural or commercial vehicles, such as those relating to drivers' hours. Nor have we included local bylaws.<sup>1</sup> To avoid unnecessary repetition, we have also omitted offences relating to specific types of pedestrian crossing or specific speed limit zones. However, the table does contain all the offences listed in the Magistrates' Court Sentencing Guidelines, which are the most commonly committed road traffic offences in England and Wales.

## A VARIETY OF PEOPLE SUBJECT TO DUTIES

1.4 Under current law, while many road traffic offences apply only to drivers, others apply more widely.<sup>2</sup> The legislation uses a variety of labels to identify the person who is primarily liable for an offence, including those "in charge of a vehicle", "using a vehicle", "driving a vehicle" and in some cases "propelling" a vehicle and "using a motorway". To add to this complexity, it may also be an offence to "cause or permit" another person to

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<sup>1</sup> Bylaws are laws that only apply in a particular locality and are usually made by municipal authorities.

<sup>2</sup> We discuss the concept of driving in paragraphs 2.60 to 2.67 of the Preliminary Consultation Paper, where we note slight differences in the judicial approaches between England and Wales and Scotland.

commit an offence. In addition, the legislation imposes some liabilities on “owners” and “registered keepers”.

- 1.5 It appears that a driver is always a “user” and is always “in charge of” a vehicle. However, the concept of a user may be wider than just the driver. The concept of “using” a vehicle is a flexible one, which involves “an element of controlling, managing or operating the vehicle at the relevant time”.<sup>3</sup> Using a vehicle in prohibited circumstances is a strict liability offence,<sup>4</sup> while “causing or permitting” involves *mens rea* (a “guilty mind”, an expression used to describe the required mental element of a criminal offence).<sup>5</sup>
- 1.6 In practice, whatever the statutory language, the courts have a strong tendency to see responsibilities as resting on a driver – that is, a person who sits behind a steering wheel and operates the controls. There are relatively few cases which discuss other ways of using or being in charge of a vehicle.
- 1.7 The terms used to describe liability for the offence may sometimes appear arbitrary. For example, the requirement to comply with road traffic signs under section 36 of the Road Traffic Act 1988 is only on the person driving or propelling a vehicle. By contrast, section 5(1) of the Road Traffic Regulation Act 1984 imposes liability for contravening a traffic regulation order<sup>6</sup> on “a person who contravenes” the order or who “uses a vehicle in contravention” of the order. In other words, only a driver is liable for going through a red light, but a user may be liable for going the wrong way down a one-way street.
- 1.8 Similar words are not always used consistently. Wilkinson’s Road Traffic Offences puts this in the following terms:

One may obtain some help from cases in which the construction of similar words in other statutes has had to be considered, but particular care must be taken. The truth of this dictum is particularly apparent when one has to consider the meaning of the phrases “to cause”, “to permit” and “to use”.<sup>7</sup> Not only has one to construe words in the context of the statute in which they appear but one may have to consider the mischief which the statutory provision is aimed at preventing.<sup>8</sup>

- 1.9 For these reasons, it is not possible to redefine existing terms such as “driver” or “user” in the context of automated vehicles without looking at the policy behind each provision. Given the various policy goals behind different offences, there is not necessarily a one-size-fits-all solution.

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<sup>3</sup> See *Brown v Roberts* [1965] 1 QB 1, discussed below at para 1.33.

<sup>4</sup> An offence for which the person doing the prohibited act is liable, irrespective of fault.

<sup>5</sup> K McCormac, P Brown, P Veits, N Watson and J Woodhouse (eds), *Wilkinson’s Road Traffic Offences* (28th ed 2017), para 1.161.

<sup>6</sup> Road Traffic Regulation Act 1984, s 2.

<sup>7</sup> Edmund Davies LJ in *Sopp v Long* [1970] 1 QB 518 at 524.

<sup>8</sup> K McCormac, P Brown, P Veits, N Watson and J Woodhouse (eds), *Wilkinson’s Road Traffic Offences* (28th ed 2017), para 1.161.

## OFFENCES RELATED TO THE CONDITION OF THE DRIVER

1.10 These offences cover driving under the influence of drink or drugs; driving without the appropriate licence and driving while disqualified.<sup>9</sup> There are also two offences relating to driving with a disability:

- (1) driving with eyesight which fails to comply with the prescribed requirements;<sup>10</sup> and
- (2) driving with a licence which was obtained on the basis of a declaration regarding a disability which the driver “knew to be false”.<sup>11</sup>

### Offences while “in charge” of a vehicle

1.11 The majority of the offences relating to a person’s condition apply only to those who are found to be driving. However, two offences apply more widely, to those “in charge” of a vehicle. Under section 4(2) of the Road Traffic Act 1988:

a person who, when in charge of a mechanically propelled vehicle which is on a road or other public place, is unfit to drive through drink or drugs is guilty of an offence.

1.12 Similarly, under section 5(1) of the Road Traffic Act 1988:

If a person—

... (b) is in charge of a motor vehicle on a road or other public place,

after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit he is guilty of an offence.

1.13 The term “in charge of a vehicle” is not statutorily defined, and has been interpreted as a matter of fact and degree. In *DPP v Watkins*, the meaning of “in charge” was said to fall into two broad categories:

- (1) If the defendant was the owner or lawful possessor or had recently driven the vehicle, he would be “in charge” and the question would be whether he was still in charge or whether he had relinquished his charge.
- (2) If the defendant was not the owner, lawful possessor or recent driver, but was sitting in the vehicle or otherwise involved with it, the question for the court was whether he had assumed charge of it.<sup>12</sup>

1.14 In *DPP v Watkins*, Lord Justice Taylor identified other relevant factors, including whether the defendant:

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<sup>9</sup> For further details of these offences, see background paper 1a.

<sup>10</sup> Road Traffic Act 1988, s 96.

<sup>11</sup> Road Traffic Act 1988, s 92(10).

<sup>12</sup> *DPP v Watkins* [1989] QB 821.

- (1) was in possession of a key that fitted the ignition; or
- (2) showed an intention to take or assert control of the car by driving.<sup>13</sup>

1.15 The concept of being “in charge of a motor vehicle” is flexible and broad. Although its scope has never been tested in a world of advanced driving automation, it would appear to include anyone in a vehicle who has put themselves in position to take over from an automated driving system. Similarly, it would cover anyone who had been driving and who had not yet fully “relinquished their charge” when the automated system took over. We therefore think that these offences would already cover a “user-in-charge”,<sup>14</sup> though there may be some advantages in making this clearer.

### Offences which apply only to driving

1.16 By contrast, four offences related to the driver’s condition apply only to drivers. These are driving without a licence; driving while disqualified; driving with poor eyesight; or driving with a licence obtained following a false declaration as to any relevant disability. For these offences, under the current law, the prosecution would need to present evidence that the accused was “driving”, rather than that the vehicle was “driving itself”.<sup>15</sup>

## OFFENCES RELATED TO THE CONDITION OF THE VEHICLE

1.17 Under the current law, drivers have important legal responsibilities to insure the vehicle and to keep the vehicle in roadworthy condition. Even in a world of self-driving vehicles, humans will continue to have these responsibilities. We have considered whether these offences are drafted sufficiently widely to work in a world of full driving automation, in which the responsible person is not driving the vehicle in the conventional sense.

### Insurance

1.18 There are three offences related to insurance in the Road Traffic Act 1988: using a vehicle without third party insurance (section 143(1)(a)); causing or permitting a person to use a vehicle without such insurance (section 143(1)(b)); and keeping a vehicle which does not meet insurance requirements under section 144A. We look at each in turn.

#### Using a vehicle without insurance

1.19 Under section 143(1)(a) of the Road Traffic Act 1988:

a person must not use a motor vehicle on a road or other public place unless there is in force in relation to the use of the vehicle by that person such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Act.

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<sup>13</sup> *DPP v Watkins* [1989] QB 821.

<sup>14</sup> See chapter 3 of the Preliminary Consultation Paper at paras 3.24 onwards.

<sup>15</sup> This phrase is used in section 2(1) of the Automated and Electric Vehicles Act 2018, discussed in chapter 6 of the Preliminary Consultation Paper.

1.20 The key concept here is that the offence is committed by a person “using” the vehicle. We explore the case law on who uses a vehicle below. As currently interpreted, it covers the driver, the driver’s employer (if the vehicle is being used for the employer’s business) and an owner in the vehicle using the vehicle directly for their own purposes. It has also been held to cover cases of “joint enterprise”, where two people act jointly in taking a vehicle without consent and one is then carried as a passenger in the vehicle.<sup>16</sup>

### Causing or permitting a person to use a vehicle without insurance

1.21 Under section 143(1)(b) of the Road Traffic Act 1988:

a person must not cause or permit any other person to use a motor vehicle on a road or other public place unless there is in force in relation to the use of the vehicle by that other person such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part of this Act.

1.22 Wilkinson explains that

The offence of “causing” unlawful use requires proof of mens rea in knowledge of the facts rendering the user unlawful: in the case of a limited company such knowledge has to be of someone exercising a directing mind over the company’s affairs.<sup>17</sup>

1.23 Wilkinson goes on to explain:

“To permit” is a vaguer term than “to cause”. It may denote an express permission, general or particular, as distinguished from a mandate. The other person is not told to use the vehicle in a particular way, but he is told that he may do so if he desires.<sup>18</sup>

1.24 Both terms are reasonably flexible. For example, the obligation may be applied to a person who is hiring the vehicle to another; or where an owner allows a person to drive the vehicle. However, the offence only applies if “another person” is using the vehicle. It would not apply if the vehicle did not have another person associated with it who was regarded as a user.

### Registered keeper

1.25 The registered keeper of a vehicle is recorded by the Driver and Vehicle Licensing Agency. In 2006 a new provision (section 144A) was inserted into the Road Traffic Act 1988 which requires a registered vehicle to meet “the insurance requirements”.

1.26 There are two alternative insurance requirements. The first is that an insurance policy identifies the vehicle as covered by the policy.<sup>19</sup> The second is that an insurance policy

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<sup>16</sup> *Leathley v Tatton* [1980] RTR 21.

<sup>17</sup> K McCormac, P Brown, P Veits, N Watson and J Woodhouse (eds), *Wilkinson’s Road Traffic Offences* (28th ed 2017), para 1.162. *James & Son Ltd v Smees* [1955] 1 QB 78; *Ross Hillman Ltd v Bond* [1974] RTR 279.

<sup>18</sup> K McCormac, P Brown, P Veits, N Watson and J Woodhouse (eds), *Wilkinson’s Road Traffic Offences* (28th ed 2017), para 1.166.

<sup>19</sup> Road Traffic Act 1988, s 144A(3).

covers any vehicle (or any vehicle of a particular description) owned by a person – and the vehicle is owned by that person.<sup>20</sup>

1.27 The registered keeper has a defence if:

- (1) the registered keeper is not the person keeping the vehicle (s144B(4));
- (2) the vehicle is not used on a road or other public place (s144B(5)); or
- (3) the vehicle had been stolen and not recovered (s144B(6)).<sup>21</sup>

1.28 This offence is less serious than using a motor vehicle without insurance, and may be dealt with by a fixed penalty notice under section 144C.

### **Offences relating to roadworthiness**

1.29 Section 40A of the Road Traffic Act 1988 states that:

A person is guilty of an offence if he uses, or causes or permits another to use, a motor vehicle or trailer on a road

when its condition “is such that the use of the motor vehicle involves a danger of injury to any person”.

1.30 This is supplemented by more specific offences, each relating to different requirements set out in the Road Vehicles (Construction and Use) Regulations 1986. Section 41A of the Road Traffic Act 1988 covers requirements as to brakes, steering-gears and tyres. It states that a person who:

uses on a road a motor vehicle or trailer which does not comply with such a requirement, or causes or permits a motor vehicle or trailer to be so used is guilty of an offence.

1.31 Similarly, section 41B deals with breaching weight requirements; section 41C forbids the use of speed assessment equipment detection devices; and section 42 deals with any other construction or use requirement. They are all expressed in similar terms. They all refer to using a vehicle, or causing or permitting a vehicle to be used.

1.32 The duties relating to insuring and complying with roadworthiness requirements use the same statutory language – using or causing or permitting a person to use a vehicle in contravention of the requirements – and have been interpreted in the same way.

### **The current law on “using a vehicle”**

1.33 The concept of using a vehicle has the potential to be a broad test, involving an element of controlling, managing or operating a vehicle. As Mr Justice Megaw said in *Brown v Roberts*:

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<sup>20</sup> Road Traffic Act 1988, s 144A(4).

<sup>21</sup> Further details are set out in the Motor Vehicles (Insurance Requirements) Regulations 2011.



a person does not "use ... a motor vehicle on a road" ... unless there is present, in the person alleged to be the user, an element of controlling, managing or operating the vehicle at the relevant time. Precisely what the extent of that element may be, it is unnecessary to seek to define.<sup>22</sup>

1.34 In practice, however, "using a vehicle" has been construed relatively narrowly. The only people held to be "users" are:

- (1) the driver;
- (2) the driver's employer, while it is being used on the employer's business;<sup>23</sup>
- (3) a person engaged in a criminal joint enterprise with the driver;<sup>24</sup> and
- (4) an owner who is in the vehicle and "using the vehicle directly for their own purposes".

1.35 The final category is based on the case of *Cobb v Williams*.<sup>25</sup> Here, the owner was a passenger in the vehicle, being driven home by a friend. He was held to be a user and was therefore found guilty for a failure to insure. Lord Widgery explained that:

the owner was in the car, and he was in the car because he wanted to make a journey, and the car was being used in order that he might make that journey.

1.36 Lord Widgery went on to say:

In my judgment this is a perfectly clear case in which the owner was undoubtedly using the car directly for his own purposes and in person, and the fact that it was being driven by somebody else on his behalf is, in this instance, a totally irrelevant matter.<sup>26</sup>

1.37 On this basis, where the owner is in the vehicle for the purpose of making a journey, they would be considered to be a user.

1.38 A more difficult issue arises when the owner is *not* in the vehicle. The current case law suggests that an owner who is not present in the vehicle is only "using" it if the driver was employed by the owner under a contract of service and at the material time was driving for the owner's business.

1.39 The case of *Hallett Silberman Ltd v Cheshire County Council* raised the possibility that a user might cover a broader category of people.<sup>27</sup> The Divisional Court held that an

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<sup>22</sup> [1965] 1 QB 1 at 15.

<sup>23</sup> K McCormac, P Brown, P Veits, N Watson and J Woodhouse (eds), *Wilkinson's Road Traffic Offences* (28th ed 2017), para 1.179.

<sup>24</sup> In *Leathley v Tatton* [1980] RTR 21, the defendant was found guilty of driving without insurance when he helped a friend to take a vehicle without consent, by jump starting it and jumping into the passenger seat.

<sup>25</sup> [1973] RTR 113.

<sup>26</sup> [1973] RTR 113 at p 115.

<sup>27</sup> [1993] RTR 32.

owner who had selected the route and decided the load to be carried might be using a vehicle, even though the owner was not in the vehicle and the driver was self-employed. However, this case was distinguished in *West Yorkshire Trading Standards Service v Lex Vehicle Leasing Ltd*.<sup>28</sup> Here the Court of Appeal gave a restricted definition of the word “use” when it is found in the same context as “cause” and “permit” in criminal statutes. An owner who was not present in the vehicle was only using it if the driver was employed by the owner under a contract of service and at the material time was driving for the owner’s business.

- 1.40 Our conclusion is that where the user-in-charge owns the vehicle, they would already be treated as a user for purposes of insurance and maintenance. However, this is less clear where the user-in-charge does not own the vehicle.

### Does the concept of an “owner” include a hirer?

- 1.41 The Road Traffic Act 1988 defines an owner as including the person in possession of a vehicle under a hire or hire purchase agreement. Section 192(1) states:

“owner”, in relation to a vehicle which is the subject of a hiring agreement or hire-purchase agreement, means the person in possession of the vehicle under that agreement.<sup>29</sup>

- 1.42 It is clear that a consumer who purchases a vehicle under a hire purchase agreement is treated as the owner. This would also appear to be the case for a long-term hire. On this basis, the principles which apply to an owner (namely that they are a user when using the vehicle for their own purposes) would also apply to a hirer.
- 1.43 We think that there are limits to how far section 192(1) requires the court to treat short-term hirers in the same way as an owner. The section applies to a “hiring agreement”, which implies some degree of formality.
- 1.44 We have considered how the current law would apply to a passenger who uses an app to summon an automated vehicle on a one-off basis, when the vehicle is authorised to operate without a user-in-charge. We think that it is unlikely that the court would hold that the customer was a “user” under section 143 or 40A of the Road Traffic Act 1988, so as to impose responsibilities on them to insure the vehicle or maintain its roadworthiness. In these circumstances, it would clearly be more appropriate to impose these duties on the licensed operator.
- 1.45 Where the hiring agreement is more long-term, the issue becomes uncertain. In an automated environment, it may become possible to hire a vehicle on a regular but non-exclusive basis. For example, a consumer could enter into an arrangement for an automated vehicle to appear at their house at 7am every weekday morning. It is not clear under the current law whether such a person would be considered to be a user. The combination of no obvious person in the driving seat, together with new forms of

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<sup>28</sup> [1996] RTR 70.

<sup>29</sup> Equally, the lessor who hires out the vehicle will not be using it (although he may be “causing” or “permitting” it to be used): see *Mickleborough v BRS (Contracts) Ltd* [1977] RTR 389.

sharing, has the potential to introduce uncertainty as to who is responsible for the vehicle.

## OFFENCES RELATING TO THE WAY THE VEHICLE IS DRIVEN

1.46 Many road traffic offences arise directly from the way that the vehicle is driven. Examples include:

- (1) dangerous driving, under section 2 of the Road Traffic Act 1988;
- (2) driving without due care and attention or reasonable consideration for other road users, under section 3 of the Road Traffic Act 1988;
- (3) failing to comply with a traffic sign, under section 36 of the Road Traffic Act 1988; and
- (4) driving at a speed exceeding the specified limit, contrary to section 81 or 89 of the Road Traffic Regulation Act 1984.

1.47 These offences relate directly to the “dynamic driving task” – that is, they are committed through the way the vehicle is steered, or the brakes or accelerator are applied.<sup>30</sup>

1.48 It is Government policy that automated vehicles should observe the standards enforced by these provisions. As the Department of Transport put it in February 2015:

Currently, the driver of a motor vehicle is responsible for observing road traffic law, adhering to speed limits, observing traffic signs and driving in a safe and considerate manner. Where there is no longer a person in the vehicle who qualifies as a driver, our understanding and intention would be that a vehicle should not be used on a public road unless used in at least as safe and considerate a manner, and in compliance with all applicable legal requirements.<sup>31</sup>

1.49 For the purposes of this discussion, we assume that any approval regime will require automated vehicles to abide by existing standards. Despite these controls, however, it remains possible that an automated vehicle will be found to have acted in a way that amounts to an offence under current law by, for example, exceeding a speed limit, or driving through a red light.<sup>32</sup> In Chapter 7, we consider how this might be dealt with, in a world in which the infringement has been committed by a machine rather than a person.

### Example: exceeding speed limits

1.50 The National Police Chiefs Council (formerly ACPO) has looked at the principles behind enforcement policy and has issued guidelines. The current version of the speed

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<sup>30</sup> We discuss the dynamic driving task in chapter 2 of the Preliminary Consultation Paper.

<sup>31</sup> Department for Transport, *The Pathway to Driverless Cars: a detailed review of regulations for automated vehicle technologies* (February 2015) para 5.8.

<sup>32</sup> Automated vehicles should be less likely to run red lights than human drivers. However for an example of automated vehicles running red lights in California, and the regulators reaction, see <https://www.theguardian.com/technology/2016/dec/14/uber-self-driving-cars-run-red-lights-san-francisco> (last visited 03 October 2018).

enforcement guidelines was issued in 2013. The guidelines explain that police officers have discretion over the appropriate enforcement action. Depending on the circumstances, the officer may decide to issue a summons; issue a fixed penalty notice; offer a speed awareness course; or caution, warn or take no action.

1.51 However, this discretion must be exercised in a way which is proportionate, targeted, consistent and transparent. The requirement that enforcement should be proportionate and targeted indicates that enforcement should be aimed at improving road safety rather than raising revenue. As ACPO put it, action taken to achieve compliance:

should be proportionate to the risks to individuals and property, based on the offender's choice to offend rather than genuine mistake or worse still confusion from unclear limits.<sup>33</sup>

1.52 To this end, police officers should consider:

whether it is proportionate to take enforcement action against the offender taking into account such facts as the level of signing and engineering to support the limit and whether it was clear to the motorist that there was a limit at that speed.<sup>34</sup>

1.53 The guidelines indicate that the action should also be proportionate to the degree to which the speed exceeds the limit. The table below indicates that a fixed penalty notice is only appropriate when the speed exceeds the limit by at least 10% plus 2 miles per hour (for example, 35 miles an hour for a 30mph limit and 79 miles an hour for a 70mph limit). In a 30mph limit, a summons should be considered where the speed exceeds 42 miles per hour and should always be issued where the speed exceeds 50 miles an hour.

1.54 The full table is as follows:

<b>Limit</b>	<b>Fixed penalty when course not appropriate</b>	<b>Speed awareness course from</b>	<b>Speed awareness course to</b>	<b>Summons in all other cases above</b>
20mph	24mph	24mph	31mph	35mph
30mph	35mph	35mph	42mph	50mph
40mph	46mph	46mph	53mph	66mph
50mph	57mph	57mph	64mph	76mph
60mph	68mph	68mph	75mph	86mph
70mph	79mph	79mph	86mph	96mph

<sup>33</sup> Association of Chief Police Officers Speed Enforcement Policy Guidelines 2013, para 5.1.

<sup>34</sup> Association of Chief Police Officers Speed Enforcement Policy Guidelines 2013, para 9.3.

- 1.55 In Chapter 7, we consider how breaches of the rules on how a vehicle is driven may be dealt with when vehicles are driving themselves. In Chapter 9, we ask if similar tolerances should apply to automated vehicles.

## OFFENCES RELATED TO WHERE A VEHICLE IS DRIVEN

- 1.56 Some offences relate to where a vehicle may be driven. For example, under section 34 of the Road Traffic Act 1988, it is an offence to drive a mechanically propelled vehicle on common land, moorland, a footpath, bridleway or restricted byway. Under section 22, it is an offence to drive on a cycle track.
- 1.57 This type of offence goes beyond the dynamic driving task and relates to strategic driving.<sup>35</sup> In Chapter 7, we ask if these offences should be extended to those who set the controls and therefore, require an automated vehicle to undertake the route.

## OFFENCES RELATED TO WHERE A VEHICLE IS LEFT

- 1.58 Many offences relate to leaving a vehicle. The table lists 10 such offences. One example is leaving a vehicle in a dangerous position contrary to section 22 of the Road Traffic Act 1988. Another is parking a vehicle on a cycle track without lawful authority.<sup>36</sup>
- 1.59 In some cases, driving and leaving offences are combined in a single provision. For example, regulation 9 of the Motorways Traffic (England and Wales) Regulations 1982 requires that, except in specified circumstances:

No vehicle shall be driven or stop or remain at rest on any hard shoulder.

- 1.60 The exceptions set out in regulation 7(2) and (3) permit vehicles to stop in the case of breakdown, accident, illness etc, but “for no longer than is necessary in the circumstances”.<sup>37</sup>
- 1.61 Here stopping on the hard shoulder in inappropriate circumstances is a dynamic driving task offence. However, “remaining at rest” longer than is necessary is not. It will be necessary to allocate responsibility for removing an automated vehicle which has broken down.

### Who is responsible for leaving offences?

- 1.62 The legislation uses a variety of terms to describe who is liable for leaving offences. Section 22 applies to “a person in charge of a vehicle”. Others relate to a person who parks.<sup>38</sup> Under the Motorways Traffic (England and Wales) Regulations 1982, offences may be committed by anyone who “uses a motorway”.

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<sup>35</sup> See para 2.21 of the Preliminary Consultation Paper.

<sup>36</sup> Road Traffic Act 1988, s 21.

<sup>37</sup> Motorways Traffic (England and Wales) Regulations 1982, reg 7(3)(b).

<sup>38</sup> For example, under RTA 1988 s 21, “any person who, without lawful authority... parks a [mechanically propelled] vehicle wholly or partly on a cycle track is guilty of an offence”.

1.63 There is very little case law on how these various phrases should be interpreted, for three reasons:

- (1) responsibility for the offence is often obvious and not in dispute.
- (2) cases directly on the provisions do not typically reach a trial and report.
- (3) the offences committed are often subsidiary to other, more serious offences such as drink-driving offences which are the focus of attention.

1.64 It is therefore difficult to say how these offences would be applied to automated vehicles. In Chapter 7, we ask if the law should be clarified to state that users-in-charge should be responsible for criminal offences of leaving vehicles in prohibited places.

## RESPONSIBILITIES AFTER AN ACCIDENT

1.65 Following an accident, drivers are required to stop and provide identifying details. If, for any reason they fail to do so, they must report the accident in person to a police station or constable within 24 hours of the accident.

1.66 The procedure which automated vehicles go through following an accident is likely to prove particularly sensitive in terms of public acceptance. We therefore look in detail at the current law.

### When do the duties apply?

1.67 The duties apply if “owing to the presence of a mechanically propelled vehicle on a road or other public place, an accident occurs”. The accident must cause:

- (1) personal injury to a person other than the driver;
- (2) damage to another vehicle;
- (3) damage to animals of particular species – namely a dog, horse, donkey, cattle, sheep, pig or goat;<sup>39</sup> or
- (4) damage to any property fixed to the road or adjacent to the road.

1.68 The notion of an accident has been interpreted widely. In *Chief Constable of West Midlands Police v Billingham*,<sup>40</sup> the court said that the test was: “would an ordinary man in the circumstances of the case say there had been an accident?” Deliberate acts do not prevent an occurrence from being an “accident”.<sup>41</sup> The incident may also be quite minor. In *R v Morris* an accident was held to occur where two car bumpers became interlocked while one car was pushing the other.<sup>42</sup>

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<sup>39</sup> See ss 170(1)(b)(ii) and 170(8) Road Traffic Act 1988.

<sup>40</sup> [1979] RTR 446.

<sup>41</sup> *R v Branchflower* [2004] EWCA Crim 2042; [2005] 1 Cr App R 10.

<sup>42</sup> [1972] RTR 201.

- 1.69 Nor does there have to be a collision. In *Quelch v Phipps*, the duty was held to apply when a passenger was injured stepping off an open platform bus.<sup>43</sup> However, the court explained that there would have to be some direct causal connection between the vehicle and the accident. As Lord Goddard put it, the duties would not apply:

if a person about to cross a road sees a motor-car, changes his mind and steps back instead of going on, and happens to knock down a pedestrian, for that would be nothing to do with the driver of the motor-car.

- 1.70 However, issues of causation are difficult to decide without any consideration of fault. The duty to stop might arise if the vehicle was travelling at excessive speed, so as to cause the pedestrian to step back hurriedly.

### The duty to stop

- 1.71 The duty to stop must be read together with section 22 of the Road Traffic Act 1988, which contains the offence of leaving a vehicle in a dangerous position. This means that the duty to stop requires the vehicle to stop in a safe place. As the case law puts it, “this is common sense”.<sup>44</sup>
- 1.72 This duty is the dynamic driving task element of the offence: it requires control of steering and braking. It would therefore need to be programmed into the automated driving system.

### The duty to provide names and addresses

- 1.73 Under section 170(2) of the Road Traffic Act 1988, following an accident, drivers must provide specified information to any person with reasonable grounds to require it. This information is: their own name and address; the name and address of the owner of the vehicle; and the identification marks of the vehicle.

### The duty to provide insurance details

- 1.74 It is not necessary to provide insurance details at the scene of the accident. However, in the case of personal injury, a driver who does not provide insurance details at the time must report the accident to the police and produce a certificate of insurance.
- 1.75 The accident must be reported within twenty-four hours, but there is some leeway to allow more time to produce the insurance certificate. Under section 170(5), a person in these circumstances who fails to report is guilty of an offence:

but he shall not be convicted by reason only of a failure to produce a certificate or other evidence if, within seven days after the occurrence of the accident, the certificate or other evidence is produced at a police station that was specified by him at the time when the accident was reported.

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<sup>43</sup> See *Quelch v Phipps* [1955] 2 All ER 302 and K McCormac, P Brown, P Veits, N Watson and J Woodhouse (eds), *Wilkinson's Road Traffic Offences* (28th ed 2017), para 7-16.

<sup>44</sup> Mr Justice Jack in *Simon Paul Bland and others v Jeanette Priscilla Morris and others* [2005] EWHC 71 (QB), at para 36.

## The duty to report

1.76 The duty to report arises if at the time of the accident the driver did not stop; or did not provide their name and address; or (in the case of personal injury) did not provide insurance details.

1.77 Under section 170(6), to comply with the duty to report, the driver:

- (1) must do so at a police station or to a constable, and
- (2) must do so as soon as is reasonably practicable and, in any case, within twenty-four hours of the occurrence of the accident.

1.78 The duty to report remains even if the accident is observed by the police.<sup>45</sup> This suggests that even if the vehicle has already transferred data to the emergency services under the new “eCall” provisions (discussed below) the information must still be reported in person. Although the statute does not specify that the report must be made in person, the courts have interpreted it in this way.<sup>46</sup>

## Two offences, one penalty

1.79 A person is guilty of an offence under section 170(4) of the 1988 Act if they fail to comply with either section 170(2) [duty to stop and give information] or section 170(3) [duty to report]. A person is guilty of two offences if they fail to comply with both.<sup>47</sup> As a matter of law, the two offences are treated as having been committed on the same occasion for the purposes of penalty points, which means that the driver’s licence is endorsed with the points for the offence incurring the most points.<sup>48</sup>

## Commentary on the current law

1.80 The law on this issue dates from the early days of motoring. The requirement to stop was introduced in 1903,<sup>49</sup> the duty to report in 1930,<sup>50</sup> and the duty to furnish insurance details in 1934.<sup>51</sup> Much of the wording remains unchanged since 1930.

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<sup>45</sup> *DPP v Hay* [2005] EWHC 1395; [2006] RTR 3.

<sup>46</sup> See *Wisdom v MacDonald* [1983] RTR 186.

<sup>47</sup> See *Roper v Sullivan* [1978] RTR 181 and K McCormac, P Brown, P Veits, N Watson and J Woodhouse (eds), *Wilkinson’s Road Traffic Offences* (28th ed 2017), para 7-23.

<sup>48</sup> *Johnson v Finbow* [1983] 1 WLR 879 (see in particular Goff LJ at p 880).

<sup>49</sup> The Motor Car Act 1903, s 6 required a driver to stop if an accident occurred “owing to the presence of the motor car”. It also required the driver to “give his name and address, and also the name and address of the owner and the registration mark or number of the car”.

<sup>50</sup> Road Traffic Act 1930, s 22. Much of the current wording is the same as this section.

<sup>51</sup> Road Traffic Act 1934, s 13.



- 1.81 The provision now appears old fashioned. This is particularly apparent in the defined list of animals. It is an offence to fail to stop after injuring “a horse, cattle, ass, mule, sheep, pig, goat, or dog”.<sup>52</sup> It does not include cats, deer or badgers.
- 1.82 The law puts considerable emphasis on face-to-face encounters, both at the scene of the accident and at the police station. Encounters at the scene can have a strong emotional element. There is an important policy question about whether as a society we wish to continue with these face-to-face interactions, or whether they could be replaced with technical or online solutions.
- 1.83 The question was raised in a 2017 study commissioned by the Motor Insurers Bureau.<sup>53</sup> The study showed that failures to stop and report are relatively common, occurring in 12% of all accidents involving personal injury. There are many reasons why people fail to stop, from panic to deliberate attempts to hide criminality. Some people can feel too intimidated to stop. The study notes that “in around 10% of observed cases, aggression from other drivers or pedestrians was also a factor that led respondents to flee the scene”.<sup>54</sup> Five out of 52 hit and run drivers interviewed left the scene because they thought that they were victims of scams (accidents deliberately brought about for the purpose of claiming compensation).<sup>55</sup>
- 1.84 The authors suggest that one possible solution would be to allow reporting as an alternative to stopping at the scene. The authors also identify a need for much clearer advice to drivers: “there is a requirement to devise and agree standard wording for a universal message for driver responsibilities”.<sup>56</sup>
- 1.85 The debate raises deeper questions about the nature of social interaction in the twenty-first century. On one view, face-to-face encounters are part of the glue that keeps society together, allowing people to offer assistance and acknowledge others’ concerns. The alternative view is that face-to-face encounters in these circumstances are unnecessary and potentially dangerous, and should be replaced by technological ways to exchange information.
- 1.86 The issue will be brought into sharper focus now that eCall has become mandatory in new cars.<sup>57</sup> Since April 2018, new cars must be fitted with a system that automatically telephones the emergency services following a serious accident. When the airbag is deployed, the system will contact Europe’s emergency number 112 to communicate the

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<sup>52</sup> This wording was introduced by the Road Traffic Act 1930, s 22(3) and is not found in the Road Traffic Act 1988, section 170(8).

<sup>53</sup> M Hopkins, S Chivers and G Stevenson-Freer, Department of Criminology at University of Leicester, *Hit-and-run: why do drivers fail to stop after an accident?* (January 2017).

<sup>54</sup> Above, p 9.

<sup>55</sup> Above, p 19.

<sup>56</sup> Above, p 34.

<sup>57</sup> Regulation (EU) 2015/758 of the European Parliament and of the Council of 29 April 2015 concerning type-approval requirements for the deployment of the eCall in-vehicle system based on the 112 service and amending Directive 2007/46/EC.

vehicle's location to the emergency services. An eCall can also be triggered manually by pushing a button in the car.

- 1.87 There are moves to abolish the requirement to report accidents in person. In January 2018, the Department for Transport explained how the requirement of reporting accidents in person puts a heavy burden on drivers, businesses and police forces.<sup>58</sup> The Government proposed to amend the legislation to allow police forces to accept police reports by other means, such as by telephone or the internet. The legislation would not mandate any particular form or reporting: each police force would have discretion to set up its own system.

## **RESPONSIBILITIES FOR THE SAFETY OF CHILDREN IN THE VEHICLE**

- 1.88 Drivers also have responsibilities for the safety of children in the vehicle. Under section 15 of the Road Traffic Act 1988, it is an offence for a person to drive a vehicle on a road unless children in the vehicle are in the appropriate seats and wearing the appropriate restraints. The law places responsibility on the driver to ensure not only that children start the journey in the appropriate seats with the restraints fastened, but that they continue to keep the restraints fastened throughout the journey.
- 1.89 Section 15 is a complex offence, which is subject to additional regulations and exemptions. In summary:
- (1) younger children must be in the correct seat for their height or weight, and wear the appropriate restraints. This applies until the child is 135 centimetres tall or has reached their 12th birthday (whichever is first);
  - (2) children of 12 or 13 years must wear adult seatbelts, as must younger children who are over 135cm tall.
- 1.90 The driver is responsible for ensuring not only that children start the journey in the appropriate seats with the restraints fastened, but that they continue to keep the restraints fastened throughout the journey.
- 1.91 There are exemptions for buses, coaches and minivans.<sup>59</sup> There is also an exception for classic cars which were originally made without seatbelts.<sup>60</sup>
- 1.92 In the Preliminary Consultation Paper, we provisionally propose that in an automated vehicle these responsibilities should rest with the user-in-charge if there is one. We seek views on how these duties might be complied with if a vehicle does not have a user-in-charge.

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<sup>58</sup> Department for Transport, *Reporting road accidents to the police, Consultation* (30 January 2018).

<sup>59</sup> See <http://www.childcarseats.org.uk/the-law/other-vehicles-buses-coaches-and-minibuses/> (last visited 3 October 2018).

<sup>60</sup> Such cars may not carry children under 3 years old, while children over 3 are only allowed to sit in the back seats. Road traffic Act 1988 s 15 as amended by The Road Traffic Act 1988 (Amendment) Regulations 1992 (SI 1992/1711) and the Motor Vehicles (Wearing of Seat Belts) (Amendment) Regulations (SI 2006/1892).

## Background Paper 1a: Road traffic offences table

- 1.1 This table covers 71 of the most important road traffic offences, including all the offences covered by the Magistrates' Court Sentencing Guidelines and others selected as having relevance to vehicles on the road, and being the most commonly committed road traffic offences in the UK.
- 1.2 Given the volume of possible offences, the table does not purport to contain every existing road traffic offence. For example, offences related to specific types of pedestrian crossing or specific speed limit zones are omitted to avoid unnecessary repetition, nor does it include local bylaws.<sup>1</sup> Since the consultation paper focuses on passenger vehicles, offences related to agricultural and commercial vehicles, including heavy goods vehicles and drivers' working hours are not reproduced.
- 1.3 The road traffic offences are organised into the following categories:
- (1) offences relating to a driver's condition;
  - (2) offences relating to the condition of a vehicle;
  - (3) offences relating to the way in which a vehicle is driven;
  - (4) offences relating to where a vehicle is driven;
  - (5) offences relating to where a vehicle is left;
  - (6) offences relating to conduct following an accident; and
  - (7) offences relating to road safety, including those involving responsibility for children.
- 1.4 This categorisation does not necessarily follow the structure of road traffic legislation or textbooks such as Wilkinson's Road Traffic Offences.<sup>2</sup> Instead it has been selected to enable logical analysis of the offences as part of the Automated Vehicles Review. This may mean, however, that some offences appear to overlap between categories; an example is causing death by driving while unlicensed, which is classed here as an offence relating to the driver's condition.
- 1.5 In the table, "RTA" signifies the Road Traffic Act 1988, "RTRA" signifies the Road Traffic Regulation Act 1984 and "C and U Regs" signifies the Road Vehicles (Construction and Use) Regulations 1986.<sup>3</sup> An asterisk [\*] signifies a provision that is not worded uniformly across Great Britain.

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<sup>1</sup> Bylaws are laws that only apply in a particular locality and are usually made by municipal authorities.

<sup>2</sup> K McCormac, P Brown, P Veits, N Watson and J Woodhouse (eds), *Wilkinson's Road Traffic Offences* (28th ed 2017).

<sup>3</sup> Road Vehicles (Construction and Use) Regulations 1986, SI 1986/1078.

## 1. OFFENCES RELATING TO THE DRIVER'S CONDITION

Offence	Who is liable?	Legislation
Driving a motor vehicle of any class otherwise than in accordance with a licence authorising them to drive a motor vehicle of that class	A person by driving, or a person who causes or permits another to drive	ss 87(1) and 87(2) RTA
Causing death by driving whilst unlicensed, disqualified or uninsured	A person... by driving	s 3ZB RTA
Causing death by driving whilst disqualified	A person... by driving	s 3ZC RTA
Causing serious injury by driving whilst disqualified	A person... by driving	s 3ZD RTA*
Driving or obtaining a licence while disqualified from obtaining a licence	A person who obtains a licence while disqualified; or a driver	s 103(1) RTA*
Driving a vehicle with a false declaration as to any relevant disability or any prospective disability	A person by driving	s 92(10) RTA
Driving with uncorrected eyesight	A person by driving	s 96(1) RTA
Causing death by careless driving when under the influence of drink or drugs	A person... by driving	s 3A RTA
Driving or attempting to drive when under the influence of drink or drugs	A person... when driving or attempting to drive	s 4(1) RTA*
Being in charge of a vehicle under the influence of drugs	A person... when in charge	s 4(2) RTA*
Driving with alcohol concentration above the prescribed limit	A person [who] drives	s 5(1)(a) RTA
Being in charge of a vehicle with alcohol concentration above the prescribed limit	A person [who] is in charge	s 5(1)(b) RTA

## 2. OFFENCES RELATING TO THE CONDITION OF A VEHICLE

Offence	Who is liable?	Legislation
Using a vehicle without an insurance policy in respect of third party risks in place in relation to that use	A person who uses or causes or permits another to use	s 143(1)(a), s 143(1)(b) RTA
Failing to produce certificate of insurance or security if required	Owner	s 171 RTA
<p>Keeping a vehicle, which does not meet these insurance requirements:</p> <p>it is covered by a policy of insurance or a security in respect of third party risks which complies with RTA Part 6, and</p> <p>the policy or security, or the certificate of insurance or security which relates to it, identifies the vehicle by its registration mark as a vehicle which is covered by the policy or security, or</p> <p>the policy or security covers any vehicle, or any vehicle of a particular description, the owner of which is a person named in the policy or security or in the certificate of insurance or security which relates to it, and the vehicle is owned by that person.</p>	The person in whose name the vehicle is registered	<p>s 144A RTA</p> <p>(NB s 144B RTA sets out a list of exceptions to this offence).</p>

## 2. OFFENCES RELATING TO THE CONDITION OF A VEHICLE

Offence	Who is liable?	Legislation
<p>Using a vehicle in a dangerous condition, which causes danger of injury to any person due to:</p> <ul style="list-style-type: none"> <li>- condition of the vehicle</li> <li>- purpose for which used</li> <li>- number of passenger carried, or the manner in which carried</li> <li>- weight, position, distribution of load, or manner in which it is secured</li> </ul>	A person who uses, or who causes or permits another to use	s 40A RTA
Using a vehicle on the road which does not comply with type approval requirements	A person who uses, or a person who causes or permits a vehicle to be used	s 63(1) RTA 1988
Using a vehicle on the road to which an alteration to the vehicle or equipment has been made which must be (but has not been) notified to the Secretary of State	A person who uses, or a person who causes or permits a vehicle to be used	s 63(3) RTA 1988
Using a vehicle for any purpose for which it is so unsuitable as to cause or be likely to cause danger or nuisance to any person in or on the vehicle or on a road	User	Reg 100 C and U Regs, ss 34(5), 40 and 172 RTA

## 2. OFFENCES RELATING TO THE CONDITION OF A VEHICLE

Offence	Who is liable?	Legislation
Altering / supplying a vehicle in an unroadworthy condition: the use of it on a road in that condition would be unlawful by virtue of regulation as regards the brakes, steering gear, tyres, construction, weight, equipment, or it is in such a condition that its use on the road would involve a danger of injury to any person	A person who supplies or alters, or who causes or permits the supply or alteration	s 75(5) RTA
Contravening or failing to comply with a construction and use requirement [other than as to brakes, steering-gear or tyres / weight requirement / use which does not give proper control]	A person who contravenes or fails to comply or a person who uses or causes or permits a non-compliant vehicle to be used	s 42(a) RTA
Using a vehicle which does not comply with a construction and use requirement [other than as to brakes, steering-gear or tyres / weight requirement / use which does not give proper control] or causing or permitting the vehicle to be so used	A person who contravenes or fails to comply or a person who uses or causes or permits a non-compliant vehicle to be used	s 42(b) RTA
Contravening construction and use requirements as to brakes, steering-gear or tyres	A person who contravenes or fails to comply or a person who uses or causes or permits a non-compliant vehicle to be used	s 41A(a) RTA
Using a vehicle which contravenes a construction and use requirement as to brakes, steering-gear or tyres or causing or permitting the vehicle to be so used	A person who contravenes or fails to comply or a person who uses or causes or permits a non-compliant vehicle to be used	s 41A(b) RTA

## 2. OFFENCES RELATING TO THE CONDITION OF A VEHICLE

<b>Offence</b>	<b>Who is liable?</b>	<b>Legislation</b>
Contravening construction and use requirement as to speed detection devices	A person who contravenes or fails to comply or a person who uses or causes or permits a non-compliant vehicle to be used	s 41C(a) RTA
Using a vehicle which contravenes construction and use requirement as to speed detection devices or causing or permitting it to be so used	A person who contravenes or fails to comply or a person who uses or causes or permits a non-compliant vehicle to be used	s 41C(b) RTA
Driving a motor vehicle in a position which does not give proper control or a full view of the road and traffic ahead or causing or permitting the vehicle to be driven in such a position	A person who drives or causes or permits the vehicle to be driven	s 41D(a) RTA



### 3. OFFENCES RELATING TO THE WAY IN WHICH A VEHICLE IS DRIVEN

Offence	Who is liable?	Legislation
Dangerous driving	A person who drives...	ss 2, 2A RTA
Causing death by dangerous driving	A person... by driving	ss 1, 2A RTA
Causing serious injury by dangerous driving	A person... by driving	s 1A RTA
Careless and inconsiderate driving	A person [who] drives	s 3 RTA
Causing death by careless, or inconsiderate, driving	A person... by driving	s 2B RTA
Driving a motor vehicle on a road at a speed exceeding a limit imposed by any enactment to which this section applies (includes temporary maximum/minimum speed limits, s 88(1) RTRA)	Driver	s 89 RTRA
Failure to comply with traffic directions from a constable or traffic officer:  - to stop the vehicle  - to proceed in, or keep to, a particular lane of traffic	A person driving or propelling	s 35 RTA*
Failure to comply with [authorised, lawfully placed] traffic signs and traffic lights	A person driving or propelling	s 36(1) RTA  (Traffic Signs Regulations and General Directions 2016/362, schedule 14, para 5 provides further details about traffic lights).

### 3. OFFENCES RELATING TO THE WAY IN WHICH A VEHICLE IS DRIVEN

Offence	Who is liable?	Legislation
Failing to stop when requested to do so by a school crossing patrol officer; or starting to drive again while the school crossing patrol officer is still displaying the prescribed sign	A person driving or propelling a vehicle	s 28 RTRA
Contravention of a traffic regulation order	The person who contravenes the order, or who uses a vehicle/causes or permits a vehicle to be used in contravention with traffic regulation orders	s 5 RTRA
Causing a vehicle or any part of it to stop within the limits of a pedestrian crossing	The driver of a vehicle	Traffic Signs Regulations and General Directions 2016/362, Schedule 14, Part 5, para 1 and RTRA s 25(5).
Stopping vehicles in controlled area around a crossing	The driver of a vehicle	Traffic Signs Regulations and General Directions 2016/362; Schedule 14, Part 5 paras 3 and 4.
Use of motor vehicle trials on footpaths, bridleways, restricted byways without authorisation of local authority	A person (by promoting or taking part)	s 33 RTA*
Using a prohibited vehicle on a motorway	A person who uses	England and Wales - s 17 RTRA, Highways Act 1980 schedule 4.  Scotland – Roads (Scotland) Act 1984, schedule 3.
Driving a carriage furiously in a street, to the obstruction, annoyance or danger of the residents or passengers	A person who drives	Town Police Clauses Act 1847 s 28

#### 4. OFFENCES RELATING TO WHERE A VEHICLE IS DRIVEN

Offence	Who is liable?	Legislation
Driving mechanically propelled vehicles elsewhere than on roads:  - on common land, moorland etc.  - on any road being a footpath, bridleway or restricted byway	A person who drives	s 34 RTA
Driving a vehicle wholly or partly on a cycle track, without lawful authority	A person who drives	s 21(1) RTA
Wilfully riding upon any footpath or causeway by the side of any road made or set apart for pedestrians; or leading a carriage of any description or any truck, upon any such footpath or causeway	A person who rides or leads a carriage or truck	Highway Act 1835 s72

## 5. OFFENCES RELATING TO WHERE A VEHICLE IS LEFT

Offence	Who is liable?	Legislation
Leaving vehicles in dangerous positions: in such a position or in such condition or in such circumstances as to involve a danger of injury to other persons using the road	A person in charge of a vehicle who causes or permits the vehicle to be left	s 22 RTA
Leaving a motor vehicle which is not attended by a person licensed to drive it unless the engine is stopped and any parking brake with which the vehicle is required to be equipped is effectively set	Any person who leaves a motor vehicle	C and U Regs, regs 98 and 107
Leaving two or more vehicles parked within 500 metres of each other on a road where they are exposed or advertised for sale; or causing two or more vehicles to be so left	A person who leaves vehicles or causes them to be left	s 3 Clean Neighbourhoods and Environment Act 2005
Obstructing the highway, without lawful authority or excuse	A person who obstructs	England and Wales - s 137 Highways Act 1980 and s 28 Town Police Clauses Act 1847  Scotland – common law
Causing or permitting a motor vehicle or trailer to stand on a road so as to cause any unnecessary obstruction of the road	A person in charge of a motor vehicle	Regulation 103 Construction and Use Regulations
Parking a mechanically propelled vehicle wholly or partly on a cycle track without lawful authority	A person	England and Wales - s 21 RTA  Scotland – s 129(6) Roads (Scotland) Act 1984

Stopping or remaining at rest on a carriageway or motorway	A person who stops the vehicle	England and Wales - Motorways Traffic (England and Wales) Regulations 1982/1163, reg 7  Scotland – Motorways Traffic (Scotland) Regulations 1995/2507, reg 6
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## 5. OFFENCES RELATING TO WHERE A VEHICLE IS LEFT

Offence	Who is liable?	Legislation
Stopping or remaining at rest on any hard shoulder or emergency refuge area (unless necessary because of breakdown, accident, emergency or illness, for example)	A person who stops a vehicle or lets it remain at rest	<p>England and Wales - Motorways Traffic (England and Wales) Regulations 1982/1163, reg 9</p> <p>Scotland – Motorways Traffic (Scotland) Regulations 995/2507, reg 8.</p>
Parking a vehicle so that one or more of its wheels is resting on a footway, other land situated between two carriageways, or in any other grass verge, garden or space	Any person who parks	S 19 RTA for heavy commercial vehicles and s 15 Greater London Council (General Powers) Act 1974 for any vehicle in Greater London
Parking a vehicle wholly or partly on a cycle track, without lawful authority	Any person who parks	S 21(1) RTA

**6. OFFENCES RELATING TO CONDUCT FOLLOWING AN ACCIDENT**

<b>Offence</b>	<b>Who is liable?</b>	<b>Legislation</b>
Failing to stop and give driver's details and owner's details if required to do so	Driver	s 170 (2) RTA
Failing to report the accident	Driver	s 170 (4) RTA
Duty to give information as to identity of the driver	A person who keeps the vehicle or any other person whom the police ask for information	s 172 (2) RTA

<b>7. OFFENCES RELATING TO SAFETY</b>		
<b>OFFENCE</b>	<b>WHO IS LIABLE?</b>	<b>LEGISLATION</b>
Riding in or driving a motor vehicle in contravention of seatbelt regulations	A person committing a contravention	s 14(3) RTA
Carrying child (under 14) not wearing seat belt in the front seat of a motor vehicle, without reasonable excuse	A person who drives	s 15(1) and (2) RTA
Carrying child in rear-facing child seat in the front seat of a vehicle [not a bus] with activated airbag, without reasonable excuse	A person who drives	s 15(1A) and (2) RTA
Carrying child under 3 in the rear, or aged 3 to 14 and in the rear seat with fitted seatbelt, without the child wearing a seat belt, and without reasonable excuse	A person who drives	s 15(3) and (4) RTA
Carrying a child under 12 and shorter than 150 cm in the rear where no seat belt is fitted, when there is an unoccupied front seat with a fitted seat belt, without reasonable excuse.	A person who drives	S 15(3A) and (4) RTA
Contravening construction and use requirement as to not driving while using a hand-held telephone or other hand-held communications device	A person, or a person who contravenes by causing or permitting driving by another person	s 41D(b) RTA
Driving while using a hand-held mobile/device	A person who drives	Regulation 110(1) C and U Regs, ss 34(5), 40, 41D(b) and 172 RTA



## 7. OFFENCES RELATING TO SAFETY

OFFENCE	WHO IS LIABLE?	LEGISLATION
Causing or permitting any other person to drive a motor vehicle while using a hand-held mobile/device	A person who causes or permits another to drive	Regulation 110(2) C and U Regs, ss 34(5), 40, 41D(b) and 172 RTA
Supervising a holder of a provisional license if supervising while using a hand-held mobile/device while provisional license holder is driving on a road	A person	Regulation 110(3) C and U Regs, ss 34(5), 40, 41D(b) and 172 RTA
Causing danger to road users:  - causing anything to be on or over a road  - interfering with a motor vehicle, trailer or cycle  - interfering (directly or indirectly) with traffic equipment  in circumstances that would be obvious to a reasonable person would be dangerous	A person	England and Wales - s 22A RTA  Scotland – s 129(2) Roads (Scotland) Act 1984
Tampering with motor vehicles: getting on to the vehicle or tampering with the brake or other part of its mechanism	A person	s 25 RTA
Holding or getting on to vehicle in order to be carried	A person	s 26(1) RTA
Taking or retaining hold of a vehicle while in motion to be drawn/towed	A person	s 26(2) RTA



## Background Paper 2: Offences of causing death or serious injury on the roads

- 2.1 Here we examine the way that the criminal law responds to people who cause death or serious injury on the roads. We look first at a group of eight specific statutory offences which involve causing death or serious injury by driving. All these offences require at least some fault on the part of a human driver.
- 2.2 With the introduction of automated vehicles, fault may lie elsewhere. Accidents might be caused by, for example, those who interfere with road signs or who install unauthorised software. Software developers might also act wrongly, by (for example) concealing information from regulators, which could lead to a death. It is possible that in some circumstances this behaviour might amount to manslaughter. We therefore look briefly at individual involuntary manslaughter and at corporate manslaughter, to see how these offences might be applied in the context of automated vehicles.

### OFFENCES OF CAUSING DEATH OR SERIOUS INJURY BY DRIVING

#### History

- 2.3 The offence of reckless driving was first created in 1903.<sup>1</sup> However, the offence of causing death by “reckless or dangerous driving” was not created until 1956.<sup>2</sup> The offence proved controversial.<sup>3</sup> In 1977, the offence was narrowed to cover reckless driving only, but broadened again in 1991 to causing death by dangerous driving.<sup>4</sup>
- 2.4 Seven more offences have now been created, as follows:
- (1) 1991: causing death by careless driving under the influence of drink or drugs;<sup>5</sup>

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<sup>1</sup> Motor Car Act 1903, s 1.

<sup>2</sup> Road Traffic Act 1956 s 8.

<sup>3</sup> In 1976, the Criminal Law Revision Committee proposed its repeal, objecting that “it makes the sole aggravating factor the causing of death, which may be fortuitous, instead of taking account of the degree of negligence in a particular case”. See the Criminal Law Revision Committee, *Working Paper on Offences against the Person* (1976) at para 97. See also the James Committee, *The Distribution of Criminal Business between the Crown and Magistrates’ Courts* (1975).

<sup>4</sup> Road Traffic Act 1988, s 1.

<sup>5</sup> Road Traffic Act 1988, s 3A.

- (2) 2006: causing death by careless driving;<sup>6</sup> and by driving while uninsured;<sup>7</sup> unlicensed;<sup>8</sup> or disqualified;<sup>9</sup>
- (3) 2012: causing serious injury by dangerous driving;<sup>10</sup>
- (4) 2015: causing serious injury by driving while disqualified.<sup>11</sup>

2.5 In 1992, a new offence of “aggravated vehicle-taking” was introduced.<sup>12</sup> There are two elements to this offence. First, the vehicle must be taken without authority contrary to section 12 of the Theft Act 1968. Secondly, before the vehicle is recovered, one or more of the following circumstances must occur:

- (1) the vehicle was driven dangerously on a road or other public place;
- (2) an accident occurred (owing to the driving of the vehicle) by which injury was caused to any person;
- (3) an accident occurred (owing to the driving of the vehicle) by which damage was caused to any property (other than the vehicle); or
- (4) damage was caused to the vehicle.

2.6 As with the offences of causing death or personal injury, this is a “result crime”. It requires a conduct element (taking), circumstances (without authority) and a result (injury or damage). Where death occurs, the original maximum penalty of 5 years was increased to 14 years by the Criminal Justice Act 2003. Unlike the other offences, however, it includes non-serious personal injury and damage to property.

### A matter of luck?

2.7 In all these offences, the underlying conduct or circumstances (such as dangerous driving or driving while uninsured) are already an offence. The offence becomes more

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<sup>6</sup> Road Traffic Act 1988, s 2B.

<sup>7</sup> Road Traffic Act 1988, s 3ZB(c).

<sup>8</sup> Road Traffic Act 1988, s 3ZB(a).

<sup>9</sup> Road Traffic Act 1988, s 3ZC. The Criminal Justice and Courts Act 2015 removed the offence of causing death by driving while disqualified and created the separate offences of causing death and causing serious injury while disqualified: Criminal Justice and Courts Act 2015, sch 6 para 1 and s 29(1). At the same time, the maximum penalty for causing death by driving while disqualified was increased from 2 years’ imprisonment to 10: Criminal Justice and Courts Act 2015 s 29(2), Road Traffic Offenders Act 1988, sch 2, part 1.

<sup>10</sup> Road Traffic Act 1988, s 1A.

<sup>11</sup> Road Traffic Act 1988, s 3ZD.

<sup>12</sup> Theft Act 1968, s 12A, introduced by the Aggravated Vehicle-Taking Act 1992. Where death occurs, the original maximum penalty of 5 years was increased to 14 years by the Criminal Justice Act 2003.

serious because of the result, even though the outcome “might be purely a matter of luck”.<sup>13</sup>

- 2.8 This raises the seemingly intractable problem of “moral luck”, first raised by philosophers Thomas Nagel and Bernard Williams.<sup>14</sup> There are strongly divergent views on how far punishment should reflect the wrongfulness of the action, and how far it should reflect the harm caused.<sup>15</sup> A recent commentator notes that one side of the debate “is the nearly universal intuition, embodied in nearly every legal jurisdiction, that results do, in fact, matter”. On the other side “is the seemingly unimpeachable argument” that results outside our control do not deserve to be punished.<sup>16</sup>
- 2.9 These strands run through the debate on offences of causing death or serious injury by driving. As discussed below, the courts have been reluctant to convict drivers of an offence of causing death unless the death resulted from a least some element of fault on the part of the driver. On the other hand, there is considerable public pressure to impose severe sentences on those who commit driving offences if their actions result in considerable harm.

### Controversy over offences of causing death by “unlawful driving”

- 2.10 Today, the offences of causing death by dangerous or careless driving are relatively uncontroversial because there is a direct link between the poor driving and the fatality. However, there is controversy over offences of causing death by “unlawful driving” (that is, driving while unlicensed, disqualified or uninsured). Here there is no necessary link between the fault and the outcome.
- 2.11 In *Williams*,<sup>17</sup> the Court of Appeal held that, for the offence of causing death by driving while uninsured, the standard of the defendant’s driving was irrelevant. An uninsured driver may be guilty of the offence, even though the accident was not the driver’s fault in any way. The decision was criticised for its potential to “create apparent injustice”.<sup>18</sup>
- 2.12 The situation is made more difficult because it is possible to be uninsured without realising it, if (for example) an insurance reminder is sent to the wrong address. In one anonymised case surveyed by Cunningham:

D had been driving within the speed limit and had no chance to avoid the collision. It was only after the collision that D discovered that, due to a problem with his direct debits and a clerical error at his insurance company meaning that they only

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<sup>13</sup> R Duff, ‘Whose Luck is it Anyway?’ in C Clarkson and S Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (1st ed 2008).

<sup>14</sup> T Nagel, ‘Moral Luck’ in *Mortal Questions* (1991) p 26; B Williams, ‘Moral Luck’ in *Moral Luck: Philosophical Papers 1973-1980* (1981) p 20.

<sup>15</sup> A Ashworth, ‘Taking the Consequences’ in S Shute, J Gardner, and J Horder (eds), *Action and Value in Criminal Law* (1993).

<sup>16</sup> C Russell, ‘Does Attempted Murder Deserve Greater Punishment than Murder?’ (2004) 18 *Notre Dame JL Ethics & Public Policy*, <http://scholarship.law.nd.edu/ndjlepp/vol18/iss2/11>

<sup>17</sup> *R v Williams (Jason)* [2010] EWCA Crim 2552.

<sup>18</sup> D Ormerod, ‘Causation: causing death by driving when unlicensed, disqualified or uninsured - construction of cause’ (2011) *Crim LR* 471.

corresponded with his previous address, his insurance had been cancelled over a month before the collision.<sup>19</sup>

- 2.13 In this type of case, as Sullivan and Simester put it, the offence “lets rip a double-barrelled discharge of strict liability”.<sup>20</sup> A person could be criminally liable for a death based on two factors, each of which were beyond their control: first, by failing to renew their insurance, and secondly, by being involved in an unavoidable collision which resulted in another’s death.

#### *R v Hughes: the driving must involve some element of fault*

- 2.14 In *Hughes*, the Supreme Court looked again at the issues raised by *Williams*.<sup>21</sup> The defendant was uninsured, but his driving was not at fault: he collided with a vehicle driven by someone under the influence of heroin, who had been driving erratically for some time. The other driver was “on a common sense view... entirely responsible for the collision which resulted in his immediate death”.<sup>22</sup>

- 2.15 The question before the court was whether Parliament had intended that an uninsured or disqualified driver should be guilty of a homicide offence if their driving had been faultless. A Home Office Consultation Paper in 2005 suggested that this might be the case. It stated:

The mere fact of taking a vehicle on to the road when disqualified is, in the Government’s view, as negligent of the safety of others as is any example of driving below the standard of a competent driver, even if the disqualified driver, at a particular time, is driving at an acceptable standard.<sup>23</sup>

- 2.16 A similar argument could be made that driving without insurance is also “negligent of the safety of others”, through the driver’s failure to insure themselves against risks to third parties. Ultimately, however, the court rejected the idea that driving at an acceptable standard was “negligent”:

However culpable it may be to drive when uninsured, unlicensed, or disqualified, if the driving is of an acceptable standard it is simply not accurate to call it negligent.... If what was meant was that there was some moral equivalence between careless or dangerous driving on the one hand and driving whilst disqualified (or uninsured or unlicensed) on the other, that may well be a tenable view so far as it goes, but a careless or dangerous driver is only fixed with criminal responsibility for a death when the manner of his driving contributes more than minimally to that death; equivalence

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<sup>19</sup> S Cunningham, “Has law reform policy been driven in the right direction? How the new causing death by driving offences are operating in practice” (2013) *Criminal Law Review* 711 at 713.

<sup>20</sup> G Sullivan and A Simester, “Causation without limits: causing death while driving without a licence, while disqualified, or without insurance” (2012) *Criminal Law Review* 753 at 753.

<sup>21</sup> *R v Hughes* [2013] UKSC 56.

<sup>22</sup> *R v Hughes* at para 5.

<sup>23</sup> Home Office, *Consultation Paper on the Review of Road Traffic Offences Involving Bad Driving* (3 February 2005) para 4.2.

would suggest that the same should be true of the uninsured, disqualified or unlicensed driver.<sup>24</sup>

2.17 In *Williams*, the Court of Appeal noted that the Road Safety Act 2006 simultaneously created the offence of causing death by careless driving and the offences of causing death by unlawful driving. It was argued that Parliament must have intended the unlawful driving offences to cover driving that was neither careless nor dangerous, or they would have been unnecessary. The Supreme Court in *R v Hughes* did not find this persuasive, noting that:

recent legislative history is replete with examples of new offences which very largely overlap with each other, or with existing offences, so that it is not altogether safe to draw a conclusion from the juxtaposition of the two new offences that they do not also overlap.<sup>25</sup>

2.18 In *Hughes*, the Court concluded that there needed to be some aspect of the driving which could properly be criticised in order to constitute the offence of *causing* death by driving while uninsured.<sup>26</sup> The Court held that if Parliament had intended the offence to cover a death caused purely by the fault of someone who collides with an uninsured driver, it could have used unequivocal language to say so. Instead, the legislation imported the concept of “causation” into the offence:

It follows that in order to give effect to the expression “causes ... death ... by driving” a defendant charged with the offence... must be shown to have done something other than simply putting his vehicle on the road so that it is there to be struck. It must be proved that there was something which he did or omitted to do by way of driving it which contributed in a more than minimal way to the death.<sup>27</sup>

2.19 The Supreme Court concluded that the offence cannot be committed “unless there is something properly to be criticised in the driving of the defendant, which contributed in some more than minimal way to the death”. This may amount to careless or inconsiderate driving, but “it may not do so in every case”.<sup>28</sup>

2.20 The decision in *Hughes* has been generally welcomed by academic commentators.<sup>29</sup> It has been followed in Scotland<sup>30</sup> and in subsequent decisions.<sup>31</sup>

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<sup>24</sup> *R v Hughes* at para 18.

<sup>25</sup> *R v Hughes* at para 24.

<sup>26</sup> *R v Hughes* at para 33, emphasis added.

<sup>27</sup> *R v Hughes* at para 28.

<sup>28</sup> *R v Hughes* at para 32.

<sup>29</sup> See, for example, D Ormerod, “Case Comment - *R v Hughes*” (2014) *Criminal Law Review* 234.

<sup>30</sup> *Stewart v HM Advocate* [2017] HCJAC 90. Although the High Court of Justiciary was not bound by *R v Hughes* it treated it as a decision “to which high regard should be paid”.

<sup>31</sup> In a driving context, see *R v McGuffog* [2015] EWCA Crim 1116; *R v Uthayakumar* [2014] EWCA Crim 123.

## *R v Taylor*: aggravated vehicle taking

- 2.21 Similar reasoning has been applied to the offence of aggravated vehicle taking. In *Taylor*, the defendant borrowed a truck belonging to a friend's employer without the employer's consent. While driving round a bend on a narrow country lane, the truck collided with a scooter, leading to the rider's death. As a preliminary matter the trial judge ruled that he would direct the jury that they had to find an element of fault in the defendant's driving before he could be convicted of that offence. The Court of Appeal reversed the judge's ruling but granted permission to appeal to the Supreme Court.
- 2.22 The Supreme Court held that for the defendant to be guilty of the aggravated offence there must be some fault with the way the vehicle was driven.<sup>32</sup> According to the court, there had to be some act or omission in the control of the vehicle which involved some element of fault, and contributed in some more than minimal way to the cause of the accident.
- 2.23 Lord Sumption stated that "the essential point made in *R v Hughes* is common to both offences".<sup>33</sup> If no fault is required "then all of the anomalous consequences which this court regarded as extraordinary in *R v Hughes* apply equally". He continued:

It means that the defendant is liable to be convicted and sentenced to a long period of imprisonment on account of an aggravating factor for which he bears no responsibility.<sup>34</sup>

- 2.24 He went on to explain that "relevant fault is the fault in the driving which is necessary to establish the causal connection between the driving and the accident".<sup>35</sup> This would not be met by proof only that the defendant had excess alcohol in his blood. The excess alcohol would show that he was guilty of a specific offence, but not that the accident was caused by the defendant's driving.<sup>36</sup>

## Public opinion and responses to consultation

- 2.25 In 2008 the Sentencing Advisory Panel carried out research with members of the public on sentencing for causing death offences.<sup>37</sup> The research found that "people generally thought that the sentencing of these offences was too lenient". This was particularly true for the "death while driving unlawfully" offences, implicitly also supporting the criminalisation of the conduct in the first place. For example, when members of the public were shown a vignette of driving without insurance, 41% favoured imprisonment, even though the advisory council had proposed a community penalty. In focus groups, people tended to take an even more punitive approach, mainly because the discussion focussed on the harm caused.

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<sup>32</sup> *R v Taylor* [2016] UKSC 5.

<sup>33</sup> *R v Taylor* [2016] UKSC 5, at para 22.

<sup>34</sup> *R v Taylor* [2016] UKSC 5, at para 22.

<sup>35</sup> *R v Taylor* [2016] UKSC 5, at para 31.

<sup>36</sup> *R v Taylor* [2016] UKSC 5, at para 31. For comment on *R v Taylor*, see K Laird, "The decline of criminal law causation without limits" (2016) 132 (Oct) *Law Quarterly Review* 566.

<sup>37</sup> Sentencing Advisory Panel, *Attitudes to the sentencing of offences involving death by driving*, Research Report 5 (2008).



- 2.26 In 2016, the Government consulted on “Driving offences and penalties relating to causing death or serious injury”. The consultation made three main proposals:
- (1) creating a new offence of causing serious injury by careless driving;
  - (2) increasing the maximum penalties for causing death by dangerous driving or careless driving under the influence of drink or drugs from 14 years to life;
  - (3) introducing a longer minimum period of disqualification from driving for any offence causing death.
- 2.27 The published response to consultation suggested that the public continues to favour longer sentences in this area. All three proposals were supported. In particular, 70% of respondents supported increasing the maximum sentence for causing death by dangerous driving from 14 years to life imprisonment. The Government pointed to a range of campaigns and petitions calling for increased penalties for dangerous driving, such as a mandatory lifetime ban on driving.<sup>38</sup>

### Implications for automated vehicles

- 2.28 Aggravated driving offences of causing death and injury are serious offences, which often result in severe sentences. The courts have been reluctant to find people guilty of these offences without at least some element of fault in their driving.
- 2.29 On the other hand, following a death or serious injury, there are strong public and political pressures to hold people accountable and to allocate blame. This can be seen in the steady increase of offences and sentences since 1991. These pressures are likely to come into play following a death caused by an automated vehicle.
- 2.30 The courts will be reluctant to find a human guilty of a homicide offence in the absence of actual fault. This point can be illustrated with an example:

D takes an automated vehicle without authority which then causes V’s death while driving itself. We consider that D would be guilty of aggravated vehicle-taking if the accident had been caused by D’s fault (such as operating the vehicle outside its operational design domain). However, if the death was caused entirely by the automated driving system, then D would be guilty of vehicle taking but not aggravated vehicle taking.<sup>39</sup>

- 2.31 A similar situation would arise if an uninsured or disqualified driver was monitoring a vehicle at SAE Level 3 which malfunctioned, causing V’s death. The driver would be guilty of causing death if they did something which could properly be criticised and which contributed in more than a minimal way to the death. If, however the fault was entirely

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<sup>38</sup> Ministry of Justice, *Response to the consultation on driving offences and penalties relating to causing death or serious injury* (October 2017), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/651879/consultation-response-on-driving-offences.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/651879/consultation-response-on-driving-offences.pdf) (1 November 2010).

<sup>39</sup> This follows from *R v Taylor* [2016] UKSC 5, discussed above.

with the automated system, the driver would be guilty of driving while uninsured or disqualified, but not of causing death.<sup>40</sup>

- 2.32 Where automated vehicles cause deaths, there are likely to be public demands for accountability. If there is no human driver to blame, these demands may be directed at other individuals, such as an owner who failed to install the correct software or the entity responsible for the automated driving system.

## MANSLAUGHTER AND CULPABLE HOMICIDE

- 2.33 Statutory offences of causing death by driving exist alongside the common law offences of manslaughter in England and Wales and culpable homicide in Scotland. There is a considerable degree of similarity between the common law offences in both jurisdictions.

### Manslaughter in England and Wales

- 2.34 There are two different types of involuntary manslaughter under English common law:<sup>41</sup> “unlawful act manslaughter” and “gross negligence manslaughter”. (For companies, there is also a statutory offence of corporate manslaughter, which we look at later in this paper.)

#### Unlawful act manslaughter

- 2.35 For this form of manslaughter, the defendant must perform a criminal act, which “all sober and reasonable people” would recognise as dangerous, and which causes a death.<sup>42</sup> A common example would be where the defendant punches the victim, causing the victim to fall over, hit their head and die from the injury. It is irrelevant whether the defendant realised that the punch was dangerous, provided that a reasonable person would recognise that there was a risk of some harm.<sup>43</sup>
- 2.36 The act must be intentional or subjectively reckless. In 1937, in *Andrews v DPP*, Lord Atkin held that where dangerous driving caused death, this was not enough in itself to constitute manslaughter:

It is perfectly possible that a man may drive at a speed or in a manner dangerous to the public and cause death and yet not be guilty of manslaughter.<sup>44</sup>

- 2.37 Lord Atkin made a distinction between doing an unlawful act and “doing a lawful act with a degree of carelessness which the legislature makes criminal”.<sup>45</sup> This distinction has been criticised, on the ground that dangerous driving is clearly not a lawful act.<sup>46</sup>

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<sup>40</sup> *R v Hughes* at para 28, discussed above.

<sup>41</sup> Involuntary manslaughter covers unintentional killing. Other types of manslaughter, such as where a killer has diminished responsibility, are not relevant to the present discussion.

<sup>42</sup> *DPP v Newbury* [1977] AC 500, 507 by Lord Salmon.

<sup>43</sup> *R v Church* [1966] 1 QB 59 at 70.

<sup>44</sup> *Andrews v DPP* [1937] AC 567.

<sup>45</sup> *Andrews v DPP* [1937] AC at 585.

<sup>46</sup> See D Ormerod and K Laird, *Smith and Hogan's Criminal Law* (14th ed 2015) p 628.

However, it is now understood to mean that the unlawful act must involve a mental element which goes beyond mere negligence.<sup>47</sup>

- 2.38 The decision in *Andrews* means that unlawful act manslaughter is rarely used in road traffic deaths. It is not available where the unlawful act consists only of dangerous or careless driving. Instead, as we have seen, specific “causing death” offences are available, and very serious cases can be dealt with by “gross negligence manslaughter”, discussed below.

#### Unlawful act manslaughter by interfering with a vehicle

- 2.39 In *R v Meeking*, the defendant was a passenger in a car, driven by her husband.<sup>48</sup> During an argument, she suddenly put the handbrake on, causing the car to spin out of control and collide with another vehicle. Her husband was killed. The defendant later said that she did it spontaneously “to make him stop”.

- 2.40 The defendant was charged with manslaughter on the basis of an unlawful act. The unlawful act in question was that she had interfered with a motor vehicle contrary to section 22A of the Road Traffic Act 1988.<sup>49</sup>

- 2.41 Section 22A is highly relevant to an automated driving environment, and we discuss it in detail in Chapter 8. It has three elements: causing anything to be on or over a road; interfering with a motor vehicle; or interfering with traffic signs or other equipment. The act must be:

- (1) done “intentionally and without lawful authority or reasonable cause”; and
- (2) in such circumstances that it would be obvious to a reasonable person that to do so would be dangerous.

- 2.42 Section 22A has the potential to cover a range of acts, from putting an obviously dangerous automated vehicle on the road, to interfering with a vehicle’s sensors, to disrupting traffic signs.

- 2.43 The defendant appealed, arguing that pulling on a handbrake was not interfering with a vehicle. Her counsel argued that interference must have occurred prior to driving, or be external to the vehicle, or change the physical nature of the vehicle. The Court of Appeal rejected these arguments and upheld the conviction.

- 2.44 Professor Ashworth has criticised the judgment, arguing that section 22A is essentially a crime of negligence, and insufficient for unlawful act manslaughter.<sup>50</sup> He explains the House of Lords decision in *Andrews* in the following terms:

Essentially Lord Atkin indicated that a prosecution for unlawful act manslaughter should not be founded on a crime of negligence. If the essence of the crime relied upon as the unlawful act is negligence, then the case should be taken under the

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<sup>47</sup> Above.

<sup>48</sup> *R v Meeking* [2012] EWCA Crim 641.

<sup>49</sup> Road Traffic Act 1988, s 22A(1)(b).

<sup>50</sup> A Ashworth, Case Comment [2013] *Criminal Law Review* 333.

heading of manslaughter by gross negligence. There is some logic to this proposition, since the alternative would allow people to be convicted of manslaughter merely on the basis of civil negligence, whereas the whole thrust of gross negligence is that a higher level of lack of care should be needed....

2.45 Professor Ashworth describes section 22A(1)(b) of the Road Traffic Act as appearing to be both a crime of intention and of negligence, but “in essence it is a crime of negligence”. The section criminalises a person who “intentionally ... interferes with a motor vehicle” in such circumstances “that it would be obvious to a reasonable person that to do so would be dangerous”. “Intentional interference” is the means adopted, but the standard of liability, he suggests, is the negligent causing of danger, presumably to life or limb. The intentional interference is only part of the wrong involved.

2.46 In *Meeking*, the Court of Appeal recognised “a possible ground for concern” if a case which was “essentially one of negligence” but falling short of gross negligence was prosecuted as unlawful act manslaughter. However:

No such argument has been advanced in the present case, and in our view rightly so. It was perhaps an unnecessary complication for the Crown to have relied on unlawful act manslaughter in this case, rather than taking what might have seemed the more natural approach of presenting the case as one of gross negligence manslaughter, but on the facts of this case we find it impossible to conclude that the jury could have come to any other verdict than guilty if the case had been prosecuted as one of gross negligence manslaughter.

2.47 A leading text on criminal law also comments that *Meeking* “ought to be treated with considerable caution”, on the ground that unlawful act manslaughter “should be read restrictively and should be based on offences that require *mens rea* proper”.<sup>51</sup>

### Implications for automated vehicles

2.48 Unlawful act manslaughter is rarely prosecuted in road traffic cases, but there are circumstances where it may be relevant to automated vehicles. An example would be where an unauthorised person hacked into an automated vehicle intending to do harm. This would be contrary to section 3ZA of the Computer Misuse Act 1990, which applies where:

- (1) the person does any unauthorised act in relation to a computer;
- (2) at the time of doing the act the person knows that it is unauthorised;
- (3) the act causes, or creates a significant risk of, serious damage of a material kind (which includes damage to human welfare); and

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<sup>51</sup> D Ormerod and K Laird, *Smith and Hogan's Criminal Law* (14th ed 2015) p 628-9. With offences that require *mens rea* (a guilty mind), a defendant is only guilty if they did the prohibited act with a certain state of mind – intentionally, recklessly, etc. See also T Rees and D Ormerod ‘Manslaughter - administration of insulin with consent of deceased causing death’ [2003] *Criminal Law Review* 478. This deals with the same point in another context. In *R v Andrews* [2002] EWCA Crim 2021, the defendant administered insulin to another person (with her consent) who later died. The unlawful and dangerous act or “base offence” was administering a prescription-only drug contrary to the Medicines Act 1968.

- (4) the person intends by doing the act to cause serious damage of a material kind or is reckless as to whether such damage is caused.

2.49 If the action was not intended to cause death but did, it would meet all the requirements of unlawful act manslaughter. The defendant would have committed a criminal act with either intent to cause damage or reckless about whether it was caused, which a reasonable person would recognise as involving a risk of harm. The prosecution would need to prove that the defendant had breached section 3ZA of the Computer Misuse Act 1990 and that this had caused the death.

2.50 The same reasoning would also apply to an owner who knowingly uploaded unauthorised software onto their vehicle, if they did so with recklessness about the damage it might do to other road users. However, there would have to be a positive act. Unlawful act manslaughter would not apply, for example, to an owner who failed to upload safety critical software.<sup>52</sup>

2.51 It is uncertain whether other ways of interfering with automated vehicles, such as defacing traffic signs could also be used as the basis of unlawful act manslaughter. If the action was obviously dangerous it would amount to an offence under section 22A of the Road Traffic Act 1988. Applying *Meeking*, this might amount to unlawful act manslaughter. However, there is uncertainty on this point. Given the doubts expressed about *Meeking*, it is more likely that cases would be prosecuted as gross negligence manslaughter, discussed below. Nor would unlawful act manslaughter apply to those who were authorised to act in relation to the vehicle's software, but who did so negligently.

### Gross negligence manslaughter

2.52 Like unlawful act manslaughter, "gross negligence manslaughter" is also a common law offence developed by the courts. The elements of the offence have altered over the years, and have now gone full circle, from tests involving gross negligence, to tests based on objective recklessness, and back to tests of gross negligence.<sup>53</sup>

2.53 The current approach dates from 1995. In the leading judgment of *Adomako*,<sup>54</sup> the House of Lords set out the following elements of gross negligence manslaughter:

- (1) the defendant owed a duty of care to the victim;
- (2) the defendant negligently breached that duty;
- (3) the death of the victim was caused by the breach; and

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<sup>52</sup> In *R v Lowe* [1973] 2 WLR 481, Phillimore LJ said, "We think that there is a clear distinction between an act of omission and an act of commission likely to cause harm", quashing a manslaughter conviction based on omission to call a doctor to attend to a child. This authority has been heavily criticised by commentators such as A Ashworth, preferring a framework with punishment for omission.

<sup>53</sup> For an account of this history, see J Stannard, "From Andrews to Seymour and Back Again" (1996) 47 *NILQ* 1.

<sup>54</sup> *R v Adomako* [1995] 1 AC 171.

- (4) having regard to the risk of death involved, the defendant's conduct was so bad in all the circumstances, that a jury should judge it to be criminal.
- 2.54 While unlawful act manslaughter requires an act rather than an omission, gross negligence manslaughter can be committed by omission.<sup>55</sup>
- 2.55 For a professional defendant, the required standard of performance is that of a reasonably competent professional. But the offence requires more than simply negligence. The negligence must be so bad as to be criminal: judges are encouraged to direct juries that the conduct must have been truly exceptionally bad, so that it deserves to be treated as manslaughter. It is a difficult offence to define because it leaves the question of whether conduct should be criminal to the jury.<sup>56</sup>
- 2.56 Karl Laird comments that although prosecutions for gross negligence manslaughter are rare, they have generated a large volume of appeals. The Court of Appeal has re-evaluated the elements of the offence in a series of recent judgments, all involving health care professionals.<sup>57</sup> The cases raised two questions.
- (1) *How should the test of "so bad as to be criminal" be put to a jury?* In *Sellu*, the trial judge directed the jury that their task was not just to decide whether the defendant fell below the standard of a reasonably competent consultant surgeon, but whether "he did so in a way that was gross or severe".<sup>58</sup> The Court of Appeal held that this was insufficient. A better way of expressing the test was whether the conduct was "truly exceptionally bad", and such a departure from the required standard that it amounted to being criminal.
- (2) *What level of risk is required?* In *Rudling*, the defendant was a GP who failed to respond to a mother's request for a home visit. The child died the next day of a very rare condition. The Court of Appeal held that the fact that an assessment might reveal something life threatening was insufficient. Instead, at the time of the breach there must be "a serious and obvious risk of death".<sup>59</sup>
- 2.57 In the recent case of *Rose*, the Court of Appeal considered this point in more detail.<sup>60</sup> The defendant was an optometrist who performed a routine sight test on a child. Before the test, an assistant took retinal images, but the defendant failed to look at them: she said she must have been looking at images from the previous year. A competent optometrist who saw the images would have referred the child for immediate treatment. Without this treatment, the child died suddenly five months later. A jury found the defendant guilty of gross negligence manslaughter and she appealed.

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<sup>55</sup> In *Adomako* [1995] 1 AC 171, Lord Mackay stated: 'the essence of the matter... is whether... the conduct of the defendant was so bad in all the circumstances as to amount... to a criminal act or **omission**' (p 187).

<sup>56</sup> A leading text comments that the jury is left to decide not only whether the facts meet the test for a crime but what the test for a crime should be: "This seems objectionable in principle": D Ormerod and K Laird, *Smith and Hogan's Criminal Law* (14th ed 2015) p 643.

<sup>57</sup> K Laird, "The evolution of gross negligence manslaughter" (2018) 1 *Arch Rev* 6 at p 7.

<sup>58</sup> [2016] EWCA Crim 1716. See also *Bawa-Garba* [2016] EWCA Crim 1841.

<sup>59</sup> [2016] EWCA Crim 741.

<sup>60</sup> [2017] EWCA Crim 1168; [2018] QB 328.

- 2.58 The Court of Appeal allowed the appeal. It held that “the serious and obvious risk of death” must be assessed at the time of the breach – not on the basis of information which would have been available had the breach not taken place. It was not enough that a reasonably prudent optometrist would realise that, without a proper examination, signs of a potentially life-threatening condition might be missed. Instead, there must be a serious and obvious risk of death, judged objectively on information available to the defendant at the time.
- 2.59 The decision in *Rose* has been criticised for being more lenient towards a professional who fails to investigate at all, compared to one who investigates but fails to act on the danger signals. Laird argues that the professional who fails to investigate “seems more culpable”.<sup>61</sup>

### Prosecutions for gross negligence manslaughter

- 2.60 Laird also noted that although the categories of gross negligence manslaughter are very broad, the Court of Appeal’s recent development of the offence “has occurred solely with reference to health care professionals”.<sup>62</sup>
- 2.61 It is rare for gross negligence manslaughter prosecutions to be brought against drivers. The current Crown Prosecution Service guidance on driving offences notes that:

Gross negligence manslaughter should not be charged unless there is something to set the case apart from those cases where a statutory offence such as causing death by dangerous driving or causing death by careless driving could be proved. This will normally be evidence to show a very high risk of death, making the case one of the utmost gravity.<sup>63</sup>

### Implications for automated vehicles

- 2.62 The generality of gross negligence manslaughter is both a strength and a weakness. The strength of the offence is that it can adapt to new technologies and new dangers. Road users owe duties to each other. The offence is therefore sufficiently flexible to apply to all those who act negligently in designing, installing (or failing to install) software, in servicing vehicles, or in interfering with vehicles or roads. The requirements are that the conduct presented “a serious and obvious risk of death”; that it was, in the opinion of the jury “truly, exceptionally bad”; and that it caused the death.
- 2.63 The weakness of the offence is its uncertainty. In particular, it does little to clarify how those who develop automated driving systems should act. We have considered the effect of bringing a prosecution for gross negligence manslaughter against a software developer. If this happened, the outcome would be difficult to predict. In such a new field it would be difficult to apply a clear standard of a reasonably competent software developer. Nor would it be easy to explain to a jury whether a failure to perform any given test led to “a serious and obvious risk of death”. Thirdly, the question of whether

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<sup>61</sup> K Laird, Case Comment [2018] *Criminal Law Review* 76.

<sup>62</sup> K Laird, “The evolution of gross negligence manslaughter” (2018) 1 *Arch Rev* 6, at p 6.

<sup>63</sup> Crown Prosecution Service, *Road Traffic Offences: Guidance on Charging Offences arising from Driving Incidents* (Updated 12 February 2018), <https://www.cps.gov.uk/legal-guidance/road-traffic-offences-guidance-charging-offences-arising-driving-incidents> (1 November 2018).

conduct is “truly, exceptionally bad” would be left to the jury, who would inevitably be influenced by the tragic circumstances surrounding the death.

- 2.64 On the other hand, it is unlikely that any failure discovered could be attributed to a particular individual. It is more likely that any prosecution would be brought against a corporate entity. It would therefore need to meet the tests for corporate manslaughter, described below.

### Culpable homicide in Scotland

- 2.65 Culpable homicide is a Scots common law offence which has been described as “the killing of human beings in all circumstances, short of murder, where the criminal law attaches a relevant measure of blame to the person who kills”.<sup>64</sup> The exact boundaries of the offence are somewhat ill-defined. In practice, a great deal of discretion is vested in the Crown when it comes to deciding whether to prosecute for murder or for culpable homicide, and in deciding whether to accept a plea of guilty to culpable homicide where murder has been charged. In many cases the trial judge may leave to the jury the possibility of returning a verdict of guilty of culpable homicide as an alternative to murder.
- 2.66 In practice, culpable homicide is often divided into two broad categories; voluntary and involuntary.<sup>65</sup> Involuntary culpable homicide is the unintentional causing of death where either: the *mens rea* of the accused makes the homicide less than murder but culpable nonetheless, or where the law deems the conduct of the accused as criminal even in the absence of the relevant *mens rea*.<sup>66</sup> It is sometimes subdivided into lawful act and unlawful act types. The unlawful act type arises where the accused is involved in committing some other crime (usually assault) and death ensues. In such cases the *mens rea* is that of the underlying crime. Involuntary lawful act culpable homicide arises by contrast where the accused’s conduct is lawful but it nonetheless causes the death of the deceased. Here the *mens rea* is recklessness.

### Culpable homicide in driving cases

- 2.67 While road traffic deaths cases in Scotland are typically prosecuted as statutory offences (discussed earlier in this paper), common law prosecutions for culpable homicide in such cases still occur. As with gross negligence manslaughter in England and Wales, culpable homicide will be more appropriate than a statutory offence in certain cases.<sup>67</sup>

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<sup>64</sup> Lord Justice-General Rodger in *Drury v HMA* 2001 SLT 1013 at para 13.

<sup>65</sup> G Gordon, *The Criminal Law of Scotland* (4th ed 2017) p 273. Voluntary culpable homicide describes cases which would have been murder were it not for the presence of the partial defences of provocation or diminished responsibility. It arguably also extends to a wide range of other circumstances where a murderous intention is absent, but the killing is nonetheless intentional at some level and hence may be seen as culpable. This might cover so-called ‘mercy killings’ for example.

<sup>66</sup> G Gordon, *The Criminal Law of Scotland* (4th ed 2017) p 273.

<sup>67</sup> See for example *HMA v Purcell* 2008 JC 131. The accused drove a car so recklessly that he hit and killed a young boy. He was charged with murder but convicted of culpable homicide.



- 2.68 While the case of *Drever and Tyre*<sup>68</sup> concerned a shipping collision, it has influenced the law of culpable homicide in relation to road traffic cases. In that case, Lord Young directed the jury that:

The law upon this subject undoubtedly is, that any person who is in a situation or charged with a duty which involves the safety of human life, must observe care and caution in the discharge of his duty, or at least an absence of gross negligence and recklessness. I put it to you in that way, gentlemen, because it is not any slight fault or neglect which will make a man a criminal; it must be a notable and serious fault or neglect by a man upon whose care and caution the safety of human life depends.

- 2.69 The important point here is that the court required more than just negligence; it required “gross negligence”. This case marked a development in the law of Scotland whereby ordinary negligence is not sufficient to constitute culpable homicide. This continues to be the standard in modern case law. In the case of *HMA v Cranston*, Lord Alness stated that:

At one time in our law it was quite sufficient to establish a charge of culpable homicide that any fault on the part of the accused resulting in the death of a fellow human being had been established. I do not think that this is the law today... the carelessness which the Crown must prove, according to our conception of the law today, in a case of this kind, must be gross and palpable carelessness.<sup>69</sup>

- 2.70 This approach was approved in *Paton v HMA*,<sup>70</sup> where the appeal court stated that there must be “gross or wicked, or criminal negligence, something amounting, or at any rate analogous to a criminal indifference to the consequences”. While Gordon has described the standard set in *Paton* as, “extreme [and] ... also rather vague”,<sup>71</sup> it is clear that for a charge of culpable homicide to succeed in a road traffic case, the degree of negligence proved must be far higher than mere negligence.

- 2.71 A more recent case has described the necessary *mens rea* as “a complete disregard of the potential dangers or possible consequences”;<sup>72</sup> in *Purcell*,<sup>73</sup> a court of three judges relied on a passage in MacDonald’s *Criminal Law of Scotland* which reads:

With the prevalence of fast-travelling motor vehicles on the road, the tendency of the law in the case of fatal accidents is to hold the driver of the vehicle which inflicts the injury guilty of homicide, only if his conduct is notably and seriously negligent or displays utter disregard for the safety of others.<sup>74</sup>

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<sup>68</sup> (1885) 5 Coup 680.

<sup>69</sup> 1931 JC 28.

<sup>70</sup> 1936 JC 19 at 22 per Lord Justice-Clerk Aitchison.

<sup>71</sup> G Gordon, *The Criminal Law of Scotland* (4th ed 2017) p 282.

<sup>72</sup> *Sutherland v HM Advocate* (1994) SCCR 80.

<sup>73</sup> *HM Advocate v Purcell* [2007] HCJ 13.

<sup>74</sup> J Walker and D Stevenson, *MacDonald on the Criminal Law of Scotland* (5th ed 1948) p 101.

2.72 In sum, the degree of negligence or carelessness necessary to distinguish culpable homicide from a 'lesser' statutory offence will usually be a question for the jury to determine on the basis of their view of the particular facts of the case.

#### Implications for automated vehicles

2.73 As with unlawful act manslaughter and gross negligence manslaughter in England and Wales, the negligent acts of those who develop automated driving systems could in some circumstances attract a charge of culpable homicide. However, the same difficulties would be likely to arise, for instance in respect of identifying a particular individual or individuals responsible for the failings.

2.74 In respect of drivers rather than systems engineers, there may also continue to be situations where (as with conventional vehicles at present) a person in control of an automated vehicle acts with a sufficiently high degree of negligence to be convicted of culpable homicide. An example might be in failing to be ready to take back control of the vehicle when a specific request to that effect is made. Where the request was made in accordance with the manufacturer's design (and therefore in circumstances with which the driver should be familiar) and where the failure to respond was grossly negligent, then it would seem open to the Crown to consider a charge of culpable homicide where death resulted from the negligence and possible for a jury to convict of such an offence.

#### Corporate manslaughter and corporate homicide

2.75 In 1996, the Law Commission recommended the creation of a "corporate killing" offence to address the difficulty of bringing prosecutions for manslaughter against corporate entities.<sup>75</sup> The recommendation was implemented to a significant extent in the Corporate Manslaughter and Corporate Homicide Act 2007 ("the 2007 Act"). The Act creates an offence known in England and Wales as corporate manslaughter and in Scotland as corporate homicide.

2.76 The 2007 Act applies to a wide range of organisations, including corporations, partnerships and trade unions.<sup>76</sup> It abolished gross negligence manslaughter as far as it applied to such organisations<sup>77</sup> and created the new offence of corporate manslaughter.

2.77 Under the 2007 Act, an organisation is guilty of corporate manslaughter or corporate homicide if the "way in which its activities are managed or organised":

- (1) causes a person's death; and
- (2) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased;<sup>78</sup>

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<sup>75</sup> Final Report on Involuntary Manslaughter (1996) Law Com No 237, p 46.

<sup>76</sup> Corporate Manslaughter and Corporate Homicide Act 2007, s 1(2).

<sup>77</sup> Corporate Manslaughter and Corporate Homicide Act 2007, s 20.

<sup>78</sup> Corporate Manslaughter and Corporate Homicide Act 2007, s 1(1).

and failings by “senior managers” are a “substantial element” of the breach.<sup>79</sup>

- 2.78 The trial judge must decide whether the organisation owed the deceased a duty of care. Section 2(5) states that “the judge must make any findings of fact necessary to decide that question”. However, the jury must decide if there was a gross breach. In the context of gross negligence manslaughter by individuals, the court must direct a jury to distinguish between very serious errors which may not meet the threshold and conduct that is “truly exceptionally bad”.<sup>80</sup> The 2007 Act sets out a list of factors for the jury to consider, most of which relate to health and safety legislation. However, “this does not prevent the jury from having regard to any other matters they consider relevant”.<sup>81</sup>
- 2.79 The breach must be a management failure. In the words of section 1, it must relate to the way in which “activities are managed or organised”. As one text comments, “the language is designed to reflect the concentration on things done consistently with the organisation’s culture and policies more generally”.<sup>82</sup>
- 2.80 A substantial element of the breach must be the way in which activities are managed or organised by senior managers.<sup>83</sup> The term “senior managers” is defined in section 1(4).<sup>84</sup> It includes those at board level (“persons who play significant roles in the making of decisions about how the whole or a substantial part of its activities are to be managed or organised”). It also includes managers who play significant roles in the “actual managing or organising of the whole or a substantial part of those activities”.
- 2.81 Sections 3 to 7 contain exclusions for public bodies. In general, the Act does not apply to “a duty of care owed in respect of things done in the exercise of an exclusively public function”,<sup>85</sup> to decisions of public policy,<sup>86</sup> or to inspections.<sup>87</sup> The effect would be to prevent corporate manslaughter cases from being brought against a regulator which exercised public functions in relation to automated vehicles.

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<sup>79</sup> Corporate Manslaughter and Corporate Homicide Act 2007, s 1(3).

<sup>80</sup> *R v Sellu* [2016] EWCA Crim 1716.

<sup>81</sup> Corporate Manslaughter and Corporate Homicide Act 2007, s 8.

<sup>82</sup> D Ormerod and K Laird, *Smith and Hogan’s Criminal Law* (14th ed 2015) p 655.

<sup>83</sup> Corporate Manslaughter and Corporate Homicide Act 2007, s 1(3).

<sup>84</sup> Corporate Manslaughter and Corporate Homicide Act 2007, s 1(4)(c).

<sup>85</sup> Corporate Manslaughter and Corporate Homicide Act 2007, s 3(3), unless the organisation owes the duty in its capacity as an employer or as an occupier of premises, or to a detained person.

<sup>86</sup> Corporate Manslaughter and Corporate Homicide Act 2007, s 3(1). This includes decisions on the allocation of public resources or the weighing of competing public interests.

<sup>87</sup> Corporate Manslaughter and Corporate Homicide Act 2007, s 3(3), unless the organisation owes the duty in its capacity as an employer or occupier of premises.

## Sentences

- 2.82 An organisation guilty of corporate manslaughter or corporate homicide can be fined up to an unlimited amount.<sup>88</sup> The court can also impose a “publicity order” requiring the organisation to publicise “in a specified manner” the conviction and fine.<sup>89</sup>
- 2.83 The current sentencing guidelines on corporate manslaughter state that a fine must be punitive and sufficient to have an impact on the defendant.<sup>90</sup> The guidelines note that “the court should examine the financial circumstances of the offender in the round to assess the economic realities of the organisation and the most efficacious way of giving effect to the purposes of sentencing”.<sup>91</sup> The court should also consider whether the fine will have the effect of putting the offender out of business, but the guidelines note that in some circumstances this may be an acceptable consequence.<sup>92</sup>

## Corporate manslaughter and corporate homicide in practice

- 2.84 In the ten years following the 2007 Act’s introduction, there were 25 convictions.<sup>93</sup> The first successful prosecution was against Cotswold Geotechnical Holdings in 2011, a small company with a sole director.<sup>94</sup> The company allowed a junior engineer to enter a pit unsupervised, which collapsed and killed him. The company was fined £385,000.
- 2.85 The largest fine given under the Act so far was two concurrent fines of £1.2 million against Martinisation (London) Ltd, a company with a turnover of £9.7 million. The director of the company had ignored a warning that a lift would be required to move heavy furniture to the first floor of a residential building, and two employees died trying to hoist the furniture onto the balcony using ropes.<sup>95</sup>
- 2.86 Celia Wells comments that by using mainstream criminal law, the Act “represents a clear denunciation in the form of naming and shaming where corporate negligence has caused death”. However, she criticises the way in which it “insulates individual directors or managers from participatory liability in the offence”.<sup>96</sup>

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<sup>88</sup> Corporate Manslaughter and Corporate Homicide Act 2007, s 1(6).

<sup>89</sup> Corporate Manslaughter and Corporate Homicide Act 2007, s 10.

<sup>90</sup> Sentencing Council, *Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences: Definitive Guideline* (2016) pp 18 to 21. The guidelines note that “The fine must be sufficiently substantial to have a real economic impact which will bring home to management and shareholders the need to achieve a safe environment for workers and members of the public affected by their activities”; <https://www.sentencingcouncil.org.uk/wp-content/uploads/HS-offences-definitive-guideline-FINAL-web.pdf> (last visited 3 October 2018).

<sup>91</sup> Above.

<sup>92</sup> Above.

<sup>93</sup> V Roper, ‘The Corporate Manslaughter and Corporate Homicide Act 2007 – a 10-year review’ (2018) 82 *JCL* 48.

<sup>94</sup> *R v Cotswold Geotechnical (Holdings) Ltd* [2011] All ER (D) May 100.

<sup>95</sup> <http://www.bbc.co.uk/news/uk-england-london-39975651> (last visited 3 October 2018).

<sup>96</sup> C Wells, “Corporate Criminal Liability: A Ten-Year Review” (2014) *Crim LR* 849, at pp 853 to 4. For a discussion of the policy underlying corporate crime, see C Wells, *Corporations and Criminal Responsibility* (2nd ed 2001).

2.87 Wells also points out that most companies convicted of corporate manslaughter have been small or medium-sized. It is clearly easier to point to failings by senior managers where individual directors are intimately involved in day-to-day decisions than in large companies with complex management structures, where senior managers are insulated from such decisions. Due to the infrequency of prosecutions of large companies, there is little case law on who is a senior manager, or how their failings contribute to gross breaches of duty.

#### Implications of corporate manslaughter or corporate homicide for automated vehicles

2.88 The offence is particularly relevant to automated vehicles, because in many cases where an automated vehicle causes death there will not be a driver to hold responsible. A civil action against the insurer or a subrogated claim against the manufacturer will not address the victim's family's sense of injustice and desire for punishment. This leaves an "accountability gap" which may undermine public trust in automated vehicles if it is not addressed. A charge of corporate manslaughter or corporate homicide against the manufacturer or software developer that put the driving system on the road may be used to fill that gap.

2.89 Organisations developing automated driving systems clearly owe a relevant duty of care, as they are supplying goods or services.<sup>97</sup> The jury would need to consider the culture of the organisation ("the way in which activities were managed") to see if this led to a "gross breach" of that duty. There is uncertainty over what might amount to a gross breach. It clearly requires more than a defect in the driving system. It also requires more than mere negligence in the way the product is designed. A jury must be satisfied that the negligence was gross, looking at the issue in the round.

2.90 Factors that might influence a jury include concealing evidence of problems, making misrepresentations to the safety assurance authority, or adding a "defeat device" to the software. By "defeat device" we mean any software code which causes the system to perform more favourably in tests than in real life (as occurred in the Volkswagen emissions scandal).<sup>98</sup>

2.91 The need to show failings by senior managers may be problematic. Some partnership arrangements between car manufacturers and tech companies may not involve senior managers in either organisation.<sup>99</sup> This means that the offence might bite more harshly on a small tech company than on a large multi-national motor manufacturer.

2.92 One solution might be to require a director to sign any application to the safety assurance authority, stating that the Board has checked the truth of the information

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<sup>97</sup> Corporate Manslaughter and Corporate Homicide Act 2007, s 2(1)(c)(i).

<sup>98</sup> A definition of a "defeat device" is given in European car emissions legislation. See Regulation (EC) No 715/2007, arts 3(10) and 5(2).

<sup>99</sup> For a discussion of accountability problems with partnership working models, see C Hood, *The Blame Game* (2013).

given.<sup>100</sup> This would provide a link between senior managers and any gross breach of duty within the organisation.

- 2.93 The offence only applies in the event of a fatality. There is no equivalent offence which would apply to serious injuries, which may drastically change a person's life. Commentators have criticised the 2007 Act because it excludes injuries caused by corporate criminality.<sup>101</sup>

## A NEW OFFENCE? OTHER POSSIBLE MODELS

- 2.94 In Chapter 7 we ask whether the Law Commissions should consider a new corporate offence where wrongs by a developer of automated driving systems result in death or serious injury.

- 2.95 If consultees think that a new offence should be considered, the Law Commissions would need to examine possible models for such an offence in a further consultation paper. Here we look briefly at two possible models: the general duty of safety; and offences of "failing to prevent".

### The general duty of safety

- 2.96 The general duty of safety is set out in the General Product Safety Directive 2001,<sup>102</sup> and has been implemented into UK law in the General Product Safety Regulations 2005.<sup>103</sup> These stipulate that producers and distributors must only sell and supply safe products. They must inform consumers of any risks associated with the products and they must ensure any dangerous products on the market can be traced and removed.

- 2.97 There is a rebuttable presumption that a product is safe if it conforms to specific national rules or to voluntary standards published by the Commission in the Official Journal of the European Communities.<sup>104</sup> Otherwise, the safety of the product is determined by reference to:

- (1) other national standards;
- (2) Commission recommendations setting guidelines on product safety assessment;
- (3) product safety codes of good practice;
- (4) the state of the art and technology; and

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<sup>100</sup> In California, Department of Motor Vehicles (DMV) regulations for autonomous vehicle deployment state that the manufacturer must provide written details to the DMV and these reports must be signed and dated, certifying their correctness under penalty of perjury. California Code of Regulations, Title 13, Div 1, Ch 1, Art 3.8 §228.06.

<sup>101</sup> See for example J Gobert, "The Corporate Manslaughter and Corporate Homicide Act 2007 – Thirteen years in the making but was it worth the wait?" (2008) *Modern Law Review* 413.

<sup>102</sup> Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety.

<sup>103</sup> General Product Safety Regulations 2005, SI No 1803.

<sup>104</sup> Directive 2001/95/EC, art 3(2); General Product Safety Regulations 2005, reg 6.

(5) reasonable consumer expectations concerning safety.<sup>105</sup>

2.98 However, the general safety duty is only a residual duty. It does not apply if specific EU provisions with the same objective apply to the product.<sup>106</sup> As one textbook puts it:

Many products... are covered by EU specific sectoral directives which are then transposed into domestic law. In such cases the general scheme is that the 2005 Regulations apply only to the aspects and risks not covered by the specific requirements. To that extent the Regulations have only a residual role to play in ensuring product safety.<sup>107</sup>

2.99 The General Product Safety Regulations create nine separate criminal offences relating to breaches of the duty. For example, it is an offence for a producer to sell or supply a dangerous product;<sup>108</sup> or for distributors to supply a product which they know or should have presumed to be dangerous.<sup>109</sup> These offences are subject to a defence if the defendant shows that they took all reasonable steps and exercised all due diligence to avoid committing the offence.<sup>110</sup> However, penalties are low: the maximum sentence for any offence is 12 months imprisonment or a £20,000 fine, or both.

2.100 An interesting aspect of the General Product Safety Regulations is that where the supplier is a corporate body, proceedings can be brought against “any director, manager, secretary or other similar officer of the body corporate”. The prosecution must show that the act or default was committed with the “consent or connivance” of the defendant or was “attributable to [their] neglect”.

2.101 As noted in Chapter 7, Australia's NTC is also exploring how a general duty of safety might be used to provide accountability for harm caused by an automated driving system.

### **An offence of failing to prevent?**

2.102 Professor Ashworth has noted an increasing trend towards offences based on a “failure to prevent” harm. In the case of a developer of automated driving systems, for example, there might be a lack of appropriate corporate procedures for reporting suspected anomalies or problems with the automated driving system's software. The justification

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<sup>105</sup> Directive 2001/95/EC art 3(3); General Product Safety Regulations 2005, reg 6(3).

<sup>106</sup> Directive 2001/95/EC, art 1(2); General Product Safety Regulations 2005, reg 3(1). Furthermore, the duty does not apply to second-hand products if the supplier clearly informs the buyer that the product should be repaired or reconditioned before use: Directive 2001/95/EC, art 2(a); General Product Safety Regulations 2005, reg 4.

<sup>107</sup> M Bridge (ed), *Benjamin's Sale of Goods* (10th ed 2017) para 14-264.

<sup>108</sup> General Product Safety Regulations, reg 5 and 20(1).

<sup>109</sup> General Product Safety Regulations, reg 8(1) and 20(1).

<sup>110</sup> General Product Safety Regulations 2005, reg 29. If the defendant claims to have relied on information supplied by another person, the defence is only available if it was reasonable to rely on that information.

for these offences is that the commercial organisation benefits from the wrongdoing, and should therefore be under a duty to take positive steps to prevent it.<sup>111</sup>

2.103 The model is section 7 of the Bribery Act 2010, which is based on a Law Commission report.<sup>112</sup> Section 7 states that:

A relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending—

- (a) to obtain or retain business for C, or
- (b) to obtain or retain an advantage in the conduct of business for C.

2.104 However, C has a defence if it proves that it “had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct”. This is a flexible test, which depends on the size and resources of the organisation in question.<sup>113</sup>

2.105 The Law Commission had recommended an additional element to the offence, namely that an individual within the organisation should be found to be negligent.<sup>114</sup> However, the Government did not enact this requirement.

2.106 Professor Ashworth describes section 7 as:

an offence of omission (by failure to put adequate preventive procedures in place) which crystallises when one of the company’s employees or other “associated persons” commits bribery.<sup>115</sup>

2.107 The Bribery Act 2010 has served as a model for other “failure to prevent offences”. For example, under section 45 of the Criminal Finances Act 2017:

A relevant body (B) is guilty of an offence if a person commits a UK tax evasion facilitation offence when acting in the capacity of a person associated with B.

2.108 As with bribery, it is a defence for B to prove that, when the UK tax evasion facilitation offence was committed—

- (1) B had in place such prevention procedures as could reasonably be expected in all the circumstances; or
- (2) it was not reasonable in all the circumstances to expect B to have any prevention procedures in place.

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<sup>111</sup> See C Wells, “Corporate Failure to Prevent Economic Crime - A Proposal” [2017] *Criminal Law Review* 426.

<sup>112</sup> Reforming Bribery (2008), Law Com No 313.

<sup>113</sup> Law Com No 313, para 6.106. The Law Commission commented that “in a small company with five employees, it might be perfectly adequate for the managing director simply to remind the employees (and others) periodically of their obligations”. Larger companies would need more formal anti-bribery policies.

<sup>114</sup> Law Com No 313, para 6.100 to 6.101.

<sup>115</sup> A Ashworth, “Positive Duties, Regulation and the Criminal Sanction” (2017) 133 *Law Quarterly Review* 626.



2.109 Section 46 of the Criminal Finances Act 2017 enacts a similar offence in respect of foreign tax evasion.